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No. 04-473

FILED
MAY 27 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
VOLUME I OF III
(Pages 1-194)

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Petition For Certiorari Filed October 1, 2004
Certiorari Granted February 28, 2005

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January 22, 2002	Defendants' Reply to Opposition to Motion for Summary Judgment
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February 28, 2002	Notice of Appeal by Plaintiff to Ninth Circuit Court of Appeals

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March 22, 2004	Opinion issued by Ninth Circuit Court of Appeals (Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Raymond C. Fisher)
April 5, 2004	Defendants' Petition for Rehearing En Banc
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	)	No. CV 00-11106 AHM (AJWx)

DEPOSITION OF RICHARD CEBALLOS, taken on behalf of the Defendants Gil Garcetti, Frank Sunstedt, Carol Najera, County of Los Angeles at 225 South Lake Avenue, Penthouse, Pasadena, California, 91101, commencing at 10:28 a.m., Tuesday, May 8, 2001, before Sheri L. Valley, CSR NO. 12077.

* * *

[6] Q. Let me go over some of the ground rules. Your attorney may have familiarized you with a little bit about this, the general nature of today's proceeding, but just so that we're clear, the court reporter seated to my right has placed you under oath. It's the same oath as you would be taking in a court of law and requires you to tell the truth,

and if you do not, that could subject you to the penalty of perjury.

Do you understand that?

A. Yes.

Q. The court reporter is also taking down everything that we say, which means that this includes words, things that she can transcribe. Things that we may understand in our everyday conversations, like uh-huh, uh-uhs, shakes of the head, pointing with the fingers, that can't be transcribed, so it's important for you to speak audibly, clearly, and with words.

A. I understand.

Q. If at any time you need me to repeat a question, or if you don't understand a question, let me know; and if you do respond to a question, I'll assume two things: Number one, that you heard my question, and number two, that you understood it.

Okay?

A. Okay.

[7] Q. It's also important that you allow the court reporter to allow me to finish my question before you answer the questior, because she can only take down one person at a time.

Okay?

A. Yes.

Q. Another thing I wanted to mention was that at some point in time, the testimony that you give today will be transcribed into a booklet form. It will be made

available to you through your counsel for review. You may review it and make any corrections or changes to it; however, I must caution that if you do make any changes to it, any particularly significant changes – what I mean by that is if you answer a question yes today and then upon your review of the transcript, you change it to a no, that could be commented upon at the time of trial or any other proceeding related to this case, and that could prove to be embarrassing.

Do you understand that?

A. I understand.

Q. This is not a test to just get this done as soon as possible. We're not under any time constraints, so if you have to take a break, let me know, and if you have to confer with your counsel, let me know. Take your time in responding to the question. Also, I'm not here to trick

* * *

[10] A. USC.

Q. When did you graduate?

A. 1985.

Q. Where did you go to law school?

A. Loyola Law School in Los Angeles.

Q. Going back to your undergraduate, what was your major?

A. I had two. I had a bachelor of science in public administration and bachelor of arts in English.

Q. When did you graduate from Loyola?

A. 1989.

Q. What was your class ranking?

A. I don't know. I don't remember.

Q. Would you say it was more top half of the class or bottom half of the class?

A. I would say top half, but I really don't know.

Q. You're currently employed by the Los Angeles County District Attorney's office?

A. Yes.

Q. And you are a Grade 3?

A. Yes.

Q. What's your current assignment?

A. The Public Integrity Division, which is currently housed in the Criminal Courts building Downtown, but that's only for the remainder of the month. [11] They're going to move to another building across the street in the Hall of Records.

Q. But it will still be the Public Integrity Division?

A. Yes.

Q. How long have you been assigned there?

A. About four weeks now.

Q. So that would make it from April?

A. 1st of April.

Q. And that assignment is until when?

A. They don't really give a – when they assign you to an office, they don't tell you it's for a certain period. You're just there until they decide to send you somewhere else, or you request to be sent somewhere else, so it's open.

Q. So the assignment could be for another one year, or it could be for another five years?

A. Yes.

Q. Do you have intentions currently to request for a new assignment?

A. No. No, I like what I'm doing.

Q. And what specifically do you do there?

A. The unit concentrates on public officials, politics, elected officials, focuses on corruption involving public officials, misuse, misappropriation of

* * *

[13] violation of an election law code. We may – or I may do the initial evaluation to see if there's more to it, if there needs to be an investigator assigned, or even assuming everything they say is correct, is there, in fact, a violation that can be prosecuted.

A lot of times we'll review something, and clearly there's something wrong, but it's not a violation of any statute or code, and it will, of course, end right then and there.

Q. How long have you been employed with the L.A.D.A.'s office?

A. I'm in my 12th year. I started in 1989.

Q. So you went to the Los Angeles District Attorney's office right after law school?

A. Yes.

Q. So that was your first legal job?

A. Yes.

Q. Let's go down memory lane. Let's talk about your career at the D.A.'s office.

A. Okay.

Q. Prior to the Public Integrity Divisions, which you started in April, on April 1st of this year, where were you assigned?

A. To the El Monte area office.

Q. And for what period of time?

* * *

[15] MR. BECERRA: I'm sorry. Let me do a late objection as vague and ambiguous, and do a late objection to strike.

Q. BY MS. LEE: And prior to the El Monte area assignment, where were you assigned?

A. To the Pomona branch office.

Q. For what period of time?

A. I believe it was sometime beginning either late 1997 or early 1998. I don't recall exactly when I was sent there.

Q. What was your title there?

A. I don't know if we had any formal titles. I think at one point – I mean, we're all classified as grades, but at one point, I was a calendar deputy, and at another point, I was a trial deputy.

Q. Do you know what period of time you were a calendar deputy versus a trial deputy?

A. Initially upon being assigned to Pomona, I was a trial deputy. After about maybe nine months, maybe a year, then I was assigned as a calendar deputy. That lasted up till – for approximately a year until maybe May or June of 2000.

Q. What were generally your duties and responsibilities as a calendar deputy?

A. Before the courts consolidated, I was assigned [16] to one court, and this particular court was Judge Milton. All the cases that were funneled to that one court, I reviewed. These are all cases that aren't specially assigned to either domestic violence or hard-core gang or any of the other special units. I would review the cases coming in for arraignment, make appropriate offers, and try to settle the case.

I handled any preliminary motions, matters, or discovery, and if it appeared that the case would not settle, then I would assign it to a number of deputies that worked in that courtroom under me, that varied from either one to three deputies, and it was just a matter of – depending on their skill level – picking a particular case that was commensurate with their skill ability and then assigning the case to them and continuing to evaluate the progress of the case and assist the younger deputies in preparing the case if it did go to trial.

Q. Who was your immediate supervisor or supervisors in the Pomona branch?

A. Carol Najera and Frank Sunstedt, although not initially. Frank Sunstedt was the head deputy there when I first arrived. There was another assistant head deputy by the name of – I think it's Abe Weisbrodt, W-e-i-s-b-r-o-d-t. He was there maybe nine months when I

* * *

[18] Pomona.

Q. So about September of 2000 – I'm sorry, about late 1997, '98?

A. Yes.

Q. What did you do there?

A. I handled sex crimes, child abuse, child molestation, rapes.

Q. Were you still, back then, a Grade 3?

A. I was made a Grade 3 during my time that I was in sex crimes. I believe it was '96 maybe.

Q. Who was your immediate supervisor there?

A. My first supervisor was Lawrence Weis, W-e-i-s. My second supervisor was James Blissert, B-l-i-s-s-e-r-t.

Q. And prior to the sex crimes unit, where were you assigned?

A. I was assigned to the Norwalk branch area. Although I think I was actually working in the Huntington Park area office as a filing deputy, but I think I was just actually on loan from Norwalk to Huntington Park.

Q. For what period of time was that?

A. I don't remember, maybe six months.

Q. Do you know who your immediate supervisor there was?

A. John Allen, A-l-l-e-n.

Q. Prior to then, what was your assignment?

* * *

[24] opportunity to vertically prosecute any of those other assignments?

A. Yes, yes. In murder cases, you typically were – they were vertically assigned to be prosecuted, so in Norwalk and Pomona, I was assigned murder cases to vertically handle, and in some of the area courts, I recall being assigned cases to handle from the inception, or close to the time of inception, up to trial.

Q. Let's talk about the El Monte assignment.

A. Okay.

Q. When were you first notified that you would be assigned to El Monte?

A. When your client, Carol Najera, called me into her office and informed me that my position –

MR. BECERRA: Let me object as being nonresponsive and request that you reread the question. Just answer the question, okay? And I think we'll move more quickly.

THE WITNESS: Okay. I'm sorry.

MS. LEE: I thought he was doing fine, but –

MR. BECERRA: I know you did, but the question was: when were you notified?

THE WITNESS: Oh, end of August, maybe beginning of September.

Q. BY MS. LEE: Of last year?

A. Yes.

[25] Q. Can you describe the circumstances in which you were notified?

MR. BECERRA: Let me object. Calling for a narrative.

THE WITNESS: Your client, Carol Najera, called me into her office and told me that I would be moving, if you will, or changing positions. I could either – if I wanted to remain in Pomona, I would have to file misdemeanors. If not, she was going to send me to the El Monte area office to file felonies.

Q. BY MS. LEE: So you were given the option of staying in Pomona and filing misdemeanors versus being assigned to El Monte?

A. Yes.

Q. Did she indicate why?

A. Not that I recall.

Q. Did you ask why you were being assigned?

A. I may have, but I don't recall a response, if any.

Q. You don't recall responding to her in any way?

A. No. I'm saying I don't recall if she had a response.

Q. Did you have – what was your response?

A. When she – when Carol Najera asked me to choose, I told her I would not choose.

* * *

[27] Q. Yes. What was it about the options that she gave you did you perceive to be a continued form of retaliation?

MR. BECERRA: Object for the record as calling for narrative, but, you know, you can respond.

THE WITNESS: Okay. Given my experience, and a number of years being in the office, the cases I had been involved in and tried, the fact that I had been a calendar deputy, to have somebody of my experience, or caliber, if you will, filing misdemeanors in Pomona simply wasn't appropriate. It was demeaning. Filing misdemeanors is typically left to either a Grade 1 or a Grade 2. In fact, I think they had a Grade 2 at the time filing misdemeanors. It wasn't something that was typically left solely for someone as a Grade 3 filing.

And then the option of going to El Monte was a – it was characterized as freeway therapy. I was being punished by being forced to drive a greater distance to a farther location away from where I lived. With traffic, it would result in a much more extensive commute. I believe the commute I had at the time was probably no more than five or ten minutes. The commute, however, was going to change to approximately 40, 45 minutes.

Q. BY MS. LEE: You said it was characterized as

* * *

[29] deputy, and this is for an area court. That El Monte office is not – is not an area – is not a courthouse that required the services of three filing deputies, and in many – by me being sent there to file cases, even though there were two other filing deputies there, I knew I was going to be sitting around doing nothing, and, in fact, a lot of times that's what, in fact, happened. I might do some work in the morning, but in the afternoon there wasn't any work to do.

Q. Anything else about the El Monte assignment option that you perceived to be continuing retaliation?

A. Other than the fact that I remained there.

Q. Let's talk about that. So you're saying your duration at the El Monte assignment also caused you to believe that was a continued form of retaliation?

A. Sure.

Q. What about the duration?

A. I'm not sure I understand your question.

Q. Well, I'm just trying to understand how it was that you perceived the El Monte assignment as being a continued form of retaliation. You mentioned a couple of things, and the last thing was duration, the fact that you remained there.

A. Right.

Q. Were you only supposed to be there a certain

* * *

[32] A. Right.

Q. I think you indicated that you considered that option to be demeaning?

A. Right, among other reasons.

Q. And that's one of the reasons why you perceived that as being a continued form of retaliation?

A. Yes.

Q. What else made you perceive the Pomona option as being a continued form of retaliation?

A. Well, again, you had somebody who had been in the office, I think then maybe 11, 12 years, who had significant experience, worked as a calendar deputy. And to take something like that, of that caliber, and put him in a position where they're simply going to be dealing with misdemeanors is really a waste of – an incredible waste of resources, and the only reason to do something like that is either simple incompetence on the part of the management or a deliberate attempt to retaliate for past conduct. There would be no other reason to have somebody of my caliber doing that type of job.

MR. BECERRA: I'm sorry? Did you say caliber?

THE WITNESS: Caliber.

Q. BY MS. LEE: To your knowledge, prior to then, nobody of your caliber had been assigned as a filing deputy for misdemeanors in Pomona?

[33] MR. BECERRA: Objection. Vague and ambiguous as to "caliber."

THE WITNESS: That's correct. I think the person that was doing it at the time was a part-time Grade 2 deputy.

Q. BY MS. LEE: How many felony trials had you had at the time?

MR. BECERRA: At the time of the transfer?

Q. BY MS. LEE: And at the time that the option was given to you between Pomona or El Monte.

A. Approximately 50.

Q. Well, let me get your definition. I mean, caliber is a word that you used, so that's what why I was using it. What do you mean by that, someone of your caliber?

A. Experience.

Q. And experience means what specifically?

A. Experience in terms of just years in the office; number of trials; positions held before that, such as calendar deputy; the fact that I worked in the special unit; the fact that I handled murder cases before. You know, you put somebody with my experience in that position and you had other D.A.s with much less experience still handling felony matters including murders.

* * *

[37] Q. BY MS. LEE: You can answer.

A. I don't think there was a need. I think what Ms. Najera did was not based on any need. I think it was just based, again, on continued retaliation.

Q. What causes you to believe that?

MR. BECERRA: Well, let me object as asked and answered several times.

Go ahead and answer it again.

THE WITNESS: My contact with Ms. Najera and Mr. Sunstedt from the period of time beginning of March to the time where Ms. Najera gave me this option, my belief was that anything or almost anything Ms. Najera and Mr. Sunstedt did was a form of retaliation because of my conduct in the Cuskey case.

Q. BY MS. LEE: My question, though, specifically is with regard to the Pomona assignment, the filing misdemeanors assignment. Did you verify whether or not that was, in fact, an open position, or if that was a needed position? I'm just trying to find out from your perspective. Did you confirm through objective sources that this was really just not even an available position?

MR. BECERRA: Let me object as vague and ambiguous, and it's kind of three questions, so its beyond compound. I just don't know what the word is, so let me object to the form of the question, and beyond compound [38] and vague and ambiguous.

Q. BY MS. LEE: Do you understand the question?

A. I think so.

Q. Can you answer it, please.

A. After I was transferred to El Monte, it appeared that no one else was sent or assigned in the Pomona area to handle those misdemeanors.

Q. And how do you know that?

A. Talking to other D.A.s.

Q. Like who?

A. Again, maybe Mike Grosbard.

MR. BECERRA: Can I withdraw my objection?

Q. BY MS. LEE: Anybody else?

A. Again, I'm sure there were other D.A.s. I had a lot of friends there in Pomona, and I know I talked to them on a regular basis, but I don't – I don't remember who I got the information from, if it was just Mr. Grosbard or if it was Mr. Grosbard and other deputies.

Q. How long after the conversation with Ms. Najera where she offered you these two options were you actually notified that this is where you were going to be assigned to?

A. That same day.

Q. So that same day she gave you the options, you

* * *

[40] Q. So then she gave you the option, you said you're not going to choose, but you didn't give her any reasons why you weren't going to choose?

A. I may have given her some reasons, but I don't recall.

Q. And her response was what specifically?

A. I remember leaving the office, and I think just before I left the office she indicated – or she told me that she was sending me to El Monte, and I left the office. I was walking down the hall, and she came after me again – or

walked towards me again, and again offered me the option.

Q. What was your response?

A. It was the same, that I would not choose.

Q. In your mind, were either of those options – strike that. In your mind, was one worse than the other?

A. They were both bad because they were options based upon retaliation. I mean, what she was doing was basically trying to get rid of me or punish me for what I had done in the Cuskey case, so it really wasn't an option. It was, Do you want to be shot, or do you want to be hanged? That's how I took it.

Q. Well, that's what I'm trying to get at. From your perception, when Ms. Najera gave you the option of staying in Pomona, but filing misdemeanors, or going to

* * *

[43] El Monte?

A. Right.

Q. And after you were transferred to El Monte in late August or early September of 2000 and until today, have you seen Ms. Najera?

A. I don't think so, maybe on a Saturday seminar, but.

Q. But you haven't had a conversation with her between the time that you were transferred to El Monte and today?

A. No, no, I don't think so.

Q. What about Mr. Sunstedt? When was the last time you had any conversation with him?

A. Wow. I think he stopped talking to me, if not late June, maybe sometime in July where he just ceased all communication with me. He wouldn't even say good morning.

Q. Would it be accurate to say that as of late June or July of last year that you haven't had any verbal contact with Mr. Sunstedt?

A. That would be correct, yeah.

Q. When was the last time you actually saw him?

A. Saw him. It would have to be probably before my transfer to El Monte, but exactly when that was, I don't know, because he would take a lot of vacations. I don't [44] know if he was there the week before I was transferred to El Monte or if it was a week before that.

Q. Do you recall the first instance of retaliation that you experienced from either Ms. Najera or Mr. Sunstedt?

A. Yes.

Q. When was that?

A. It was probably shortly after the meeting with the sheriff's department and with Captain Binkley, B-i-n-k-l-e-y, and Lieutenant Barstow, B-a-r-s-t-o-w. Maybe within a few days of that meeting, so it would have been March of 2000.

Q. Let me try to see if I can narrow down the time frame. We know that you prepared a memo to Mr. Sunstedt dated March 2nd, 2000; is that correct?

A. That was the first memo, yes.

Q. First memo. How many days or weeks after that memo would you estimate was the meeting with Captain Binkley and Lieutenant Barstow?

A. I believe it was March 9.

Q. So within a few days of the March 9, 2000, meeting, that's when you first experienced retaliation from Ms. Najera and Mr. Sunstedt?

A. From Mr. Sunstedt, yes, within a few days to a week.

[45] Q. What about from Ms. Najera?

A. I don't have any special recollection of her being present in the room with Mr. Sunstedt, but I'm not positive.

Q. My question, though, was approximately when did you first experience retaliation from Ms. Najera?

A. Maybe about a week or so after the meeting as well, maybe a couple of weeks.

Q. Would it be accurate to say that you experienced retaliation from Ms. Najera after experiencing the first retaliation from Mr. Sunstedt?

A. They were close in time, but I mean, my recollection right now is that Frank Sunstedt retaliated first, and then Carol Najera retaliated soon thereafter.

Q. What was the first event or the first form of retaliation that you perceived from Mr. Sunstedt?

A. The first act was when Frank Sunstedt informed me that I would no longer be a calender deputy.

Q. And when was that? I'm sorry. We already went over that. Describe the circumstances in which this occurred.

MR. BECERRA: Let me object as vague and ambiguous. Also calls for a narrative.

THE WITNESS: He called me into his office and simply informed me that I would no longer be a calendar deputy, [46] and that I would go back to doing trials.

Q. BY MS. LEE: You were the only one with him in the office when he said that?

A. I believe so.

Q. And at the time, you were a calendar deputy?

A. Yes.

Q. So you were the calendar deputy of Pomona at the time?

A. I was a calendar deputy for Department E.

Q. Is that Judge Milton's courtroom?

A. Yes.

Q. What about Michael Grosbard? Wasn't he a calendar deputy at some point?

A. He was a calendar deputy for – I believe his name was Judge Gustafason, G-u-s-t-a-f-a-s-o-n.

Q. Did he give you any reason as to why you would no longer be a calender deputy?

A. No.

Q. Did you ask?

A. I don't believe I did, no.

Q. How long was this meeting?

A. Short, less than five minutes.

Q. So basically, was the substance of the meeting Mr. Sunstedt telling you you would no longer be a calendar deputy, but you would be a trial deputy, and [47] pretty much that was it?

A. Pretty much.

Q. And why did you perceive that as being a form of retaliation?

MR. BECERRA: Objection. Calls for a narrative.

THE WITNESS: Because that occurred shortly after the meeting with the sheriff's department, and it was after the meeting with the sheriff's department is when I confronted Frank Sunstedt, and I basically questioned his ethics and his – and accused him of kowtowing to the sheriff's department, of ignoring the fact that these deputy sheriffs had lied, and of setting aside his obligations simply to appease the sheriff's captain and lieutenant.

Q. BY MS. LEE: When did you have this conversation with him where you made these type of allegations directed at Mr. Sunstedt?

A. Right after the meeting with the sheriff's department.

Q. The same day as the meeting?

A. Yes.

Q. Were you alone with him?

A. I believe so, but I'm not positive.

Q. What was Mr. Sunstedt's response to his accusations right after the meeting?

* * *

[51] longer a calendar deputy?

A. Right.

Q. What was the distinction in your mind between being a calendar deputy or just a trial deputy?

A. The distinction in my mind or the distinction in the mind of the D.A.'s office?

Q. Well, let's talk about both. Is there a difference between what you were thinking – well, the difference in your mind versus what you perceived was the distinction by the D.A.'s office?

MR. BECERRA: Let me object as being vague and ambiguous.

THE WITNESS: I understand. A calendar deputy is a position of some prestige. It's not quite the same as being a head deputy or a DIC, but you do have some supervisory responsibility. You're not only there in the courtroom every single day interacting with the judge and the defense attorneys trying to negotiate dispositions

for all these cases, and perhaps a number of cases, but you're also there as a supervisor and a mentor, if you will, to these younger deputies that are assigned to the court.

So there's a lot of responsibility being a calendar deputy. You're not only handling the cases, you're not only handling all of the cases that come [52] through that courtroom, not only are you representing the office for your particular judge that you're assigned to and all these defense attorneys, but you're also shaping these younger deputies on how to be good prosecutors, as opposed to simply being a trial deputy, you're just concerned with yourself and no one else.

Q. BY MS. LEE: From a promotable standpoint, were those considered, the fact that you had experience or assignment as a calendar deputy versus trial?

A. Oh, yes, absolutely. Being a calendar deputy is, I think, a factor that the office looks at in deciding who to promote.

Q. And the difference between a calendar deputy and just being a trial deputy, that you just described, is that your perception of what the differences are, or is that how you perceive the D.A.'s office's perception?

A. I think it's not only my perception. I think it's the perception of most D.A.s in the office with the exception of older D.A.s, the dinosaurs, if you will, but I think generally the perception of the D.A.'s office is – being a calendar deputy is a nice place to be, a nice position to hold.

Q. And why did you say that there might be a different perception with the older D.A.s?

A. Just because the older deputies may be [53] pessimistic about everything just because they're older deputies. They've probably been in the office 30 years, and they don't like anything.

Q. In terms of your position as a calendar deputy, at the time, who did you have supervisorial responsibility over?

A. I remember one was Steven Gallon, G-a-l-l-o-n. I know there are others, but their names just escape me right now. I know they'll come to me. I can't think of their names right now, but it will come to me.

Q. Was it two then, two deputy D.A.s?

A. Generally two, but sometimes I remember having as many as three D.A.s.

Q. How long were you a calendar deputy at the time Mr. Sunstedt advised you that you would no longer be a calendar deputy?

A. I think about a year.

Q. So other than the conversation that you had with Mr. Sunstedt after the meeting with the L.A.S.D. personnel on March 9, was there anything else that caused you to form the belief that Mr. Sunstedt's advising you that you would no longer be a calendar deputy was a retaliatory act?

A. Not completely – I'm not sure I fully understand the question.

* * *

[55] it was retaliation. It wasn't until as time went on and further acts of retaliations by Mr. Sunstedt and Ms. Najera that I – that it finally dawned on me, "Wait a minute. These people are punishing me because of what I did."

Q. Let's talk about what it is that you did. You wrote a memo – I think this all started with the memo prepared March 2, 2000, directed to Mr. Sunstedt?

A. Yes.

Q. And let me back up since we're already on this topic of the meeting, the March 9 meeting.

A. Okay.

Q. Who was present at that meeting, other than Captain Binkley, Lieutenant Barstow, and Mr. Sunstedt?

A. Carol Najera and Steven Gallon, G-a-l-l-o-n.

Q. And that was held where?

A. In Frank Sunstedt's office there in the Pomona branch office.

Q. What was your understanding about the purpose of the meeting?

A. Frank Sunstedt told me that he had faxed a copy of my memo dated March 2nd. I don't know if he had faxed my supplemental memo. I think that was dated maybe March 6th, or around that time. He told me that he had received a phone call from Captain Binkley and that [56] Captain Binkley was demanding a meeting with the D.A.'s office prior to our moving to dismiss the case against the defendants.

Q. It probably wouldn't make sense to proceed to the meeting until we talk about the memo, so my fault.

A. Okay.

Q. So let's talk about the March 2, 2000, memo. That's what initiated, I guess, your grievance, correct?

A. I don't know if that initiated the grievance. I mean, that was the start of this entire process.

Q. So this March 2nd, 2000, memo, what was the circumstances in which you prepared this March 2 memo?

MR. BECERRA: Objection. Calls for narrative.

THE WITNESS: I was working as a calendar deputy. I was approached by an attorney, a defense attorney, by the name of Richard Escobedo, E-s-c-o-b-e-d-o, I believe. He was the defense attorney for one of the defendants. I don't know which defendant. He had asked me to review a case that I had actually assigned to Mr. Gallon.

He had basically said he believed that the deputies in the case had lied on a search warrant, and I told him to go ahead and file his motion. He indicated he already did, that it was on calendar for a motion, but that he really wanted to talk to me because he didn't – I guess he – as he stated, he wasn't – I want to say [57] happy, but he wanted somebody other than Mr. Gallon, somebody who had more experience to review the case.

Q. BY MS. LEE: Was that unusual for a criminal defense attorney to come to a calendar deputy about an issue that popped up in a case that had been filed by the D.A.'s office?

A. No.

MR. BECERRA: Objection. An incomplete hypothetical.

THE WITNESS: No, not at all. It happens quite a bit, and it depends upon the D.A. It depends on your reputation with the defense bar. I mean, if the defense bar trusts you, trusts the D.A., and they think the D.A. is fair and will seriously look at a case, they will approach you and ask, "Can you please look at a case again more closely?"

Q. BY MS. LEE: So as a calendar deputy, you have had instances where you had a criminal defense attorney come up to you to look at a case that had been filed by the D.A.'s office prior to this incident?

MR. BECERRA: Let me object as vague and ambiguous. Did you say "look at"?

Q. BY MS. LEE: Well, the same type of scenario Mr. Escobedo presented generally.

Do you understand the question?

A. Yeah. I don't know – yes, I do understand the

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[59] at one point I said, "If you really want to talk to me, you're going to have to wait until the recess."

Q. Did you know Mr. Escobedo before this, then?

A. I don't think I've ever dealt with him before. I mean it's possible that I dealt with him, but I don't think we've had any real interaction before that.

Q. And did you know of his name, his reputation, or anything like that?

A. No.

Q. And this case, People v. Cuskey, was assigned to that department that you were the calendar deputy in?

A. Yes.

Q. And that's presumably how Mr. Escobedo sought you out as opposed to anybody else?

A. Right, because I was calendar deputy.

Q. In fact, there was a subsequent conversation that you had with Mr. Escobedo?

A. Yes. After things had calmed down, the judge took a recess. That's when he spoke with me and explained his position. I don't know if the file was up there or not. It may have been, or Mr. Gallon may have been up there with the file. I may have – after speaking with Mr. Escobedo, I may have asked Mr. Gallon for the file back and told Mr. Escobedo, "Okay, I've heard you. I'm looking into it."

[60] Q. Was this the same day?

A. I think so. I believe so.

Q. If you wrote the memo, the first memo, on March 2nd, 2000, can you approximate for me how long before the preparation of that March 2 memo that you had this conversation with Mr. Escobedo?

A. No. I would assume that – not really an assumption, it's probably a good guess – probably a week to two weeks before that memo.

Q. So then you obtained a copy of the file, you obtained the file from Mr. Gallon?

A. Yes.

Q. From the People v. Cuskey case?

A. Right.

Q. Did you review that file?

A. I think I spoke to Mr. Gallon about it briefly.

Q. What was said to him, and what was said by him?

A. I don't remember. I may have asked him his opinion, what he had done on the case. I asked him for a summary of the case, just to get his initial impressions about the case, and then I read the file completely.

Q. What was Mr. Gallon – what did he tell you about the case? What was his initial impressions to you?

A. There's nothing that stuck out about what Mr. Gallon said. It's just – Mr. Gallon was a younger

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[62] A. I'm sure I probably started reading the file sometime that day. I doubt I finished reading the file. It probably took me a couple of days to read the file. I'm only guessing at this point.

Q. Can you estimate for me how big that file was at the time? In other words, was it a newly filed case, or was there some discovery – I'm sorry, not discovery. Was there substantive stuff in the file?

A. If the case was filed in 1999, I believe probably towards the latter part of 1999, and there was three defendants – and any time you have multiple defendants, it's going to be thicker than if you just have one defendant. I mean, I don't believe it was overwhelming. It was just –

you know, I really can't characterize how thick the file was.

Q. What were your impressions upon reviewing the file?

MR. BECERRA: Objection. Vague and ambiguous. Also calls for a narrative.

THE WITNESS: After I spoke to Mr. Escobedo, I reviewed the file. My initial impressions were, I've got to look into this further.

Q. BY MS. LEE: What was it about the review of the file that caused you to believe that?

A. I reviewed the search warrant in detail, and [63] paid particular attention to the language of the search warrant and the description of the property, and then Mr. Escobedo provided me with photographs as well as a videotape depicting the area in question, and I remember comparing the photographs and the videotape with the description of the warrant and noticing that there was an obvious difference.

There was clearly a mischaracterization of the description of the property. The way the deputy had described it in the warrant did not at all match what the photographs were depicting.

Q. Specifically, how did the deputy describe the property?

A. The deputy characterized the driveway simply as a long driveway, and this would be the driveway where two other deputies had actually observed tire tread marks

leading from the street up this long driveway to the defendant's property.

When I first read the warrant and I read the long driveway, my impression was, "Okay, this is maybe a driveway that's 20, 30, 40 feet, and accessed by only one residence or one occupant of the property." Where in reality, looking at the photographs, this wasn't so much a driveway as it was a separate road or accessway that was – from looking at the photographs was several [64] hundred feet long, was approximately three or four car lengths wide, and there appeared to be numerous homes, residences, single-family residences, bordering this access road, and my impression was, How can the deputies say that these tire tracks came from the defendant's home when you have all these other homes that have to use this same roadway to make ingress and egress to their respective properties?

Q. So one of the triggering factors was a discrepancy between the description of the driveway that the deputy made on the warrant versus the photographs of what this driveway was supposed to be?

A. Right.

MR. BECERRA: Objection. Misstates his testimony.

THE WITNESS: That would be one of them.

Q. BY MS. LEE: What else?

A. Well, I think that would be the red flag that I first – that forced me to look into it further.

Q. Let me ask you this: Did Mr. Escobedo indicate to you that that's something that you should look at, or did he give you any clues as to what it is that you should be looking for in the search warrant?

A. Yes.

Q. So that's something that he had mentioned to you in his prior conversation, that to take a look at the

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[69] question. I made a rough estimate that the overall length of this access road was approximately 300 feet. I then, based upon the police reports that I had in front of me, was able to make another estimate as to the area where the deputies found the stripped pickup truck and made an estimate based upon that distance.

And then I drove up and down this so-called driveway, or the access road, in my truck to see whether or not I would leave discernible tire tracks, or tread patterns, and determined that I could not over the majority of the driveway. I think there was an area further towards the end where you could get some tire tread marks, but to go the entire distance of that driveway is, in my opinion, is impossible.

Q. So upon reviewing the photographs and the videotape, as well as actually going to the scene, you would have characterized that property area to be more of an accessway instead of driveway?

A. Oh, absolutely. Characterizing it as a driveway was a complete misrepresentation of that area. It was not a driveway.

Q. And then you further concluded that there was no way that – well, strike that. What else did you conclude with regards to the veracity of what was contained in that search warrant upon your on-site [70] investigation?

MR. BECERRA: Objection. Calls for a narrative.

THE WITNESS: I had called the affiant of the warrant, Detective Keith Walls.

Q. BY MS. LEE: Had you known him before this?

A. No.

Q. You didn't know his reputation or anything like that?

A. No, not at all.

Q. What about the other deputies involved in the search or arrest?

A. Did I contact them?

Q. No. Did you know them at all?

A. Before this happened?

Q. Right.

A. No.

Q. Who were they?

A. Deputy Simpkins and Deputy Spitulski, S-p-i-t-u-l-s-k-i.

Q. So Deputy Walls was the affiant on the search warrant that we've been talking about?

A. Yes.

Q. And Deputy Simpkins and Spitulski were who?

A. They were the deputies that found the pickup truck that was stripped and allegedly followed the tire [71] tread patterns up this access road to the defendant's property.

Q. So you had – we're talking about the further observations and conclusions that you made upon your on-site investigation.

A. Right.

Q. So what were they, other than what you've already testified to?

A. I think that was it, other than the general physical nature of the roadway, and the fact that in my opinion, there's absolutely no way you can have discernible tire tracks or tread patterns that entire distance.

Q. So you concluded at that point that there was a problem with the search warrant?

MR. BECERRA: Objection. Vague and ambiguous.

THE WITNESS: I wouldn't say I concluded it at that point. I hadn't reached my conclusion yet, but again, it was another red flag.

Q. BY MS. LEE: And what else did you do to follow up?

A. I called and spoke with the affiant, Detective Walls.

Q. What was the subject of that conversation?

A. I discussed with him the fact that the defense [72] had filed this motion and what the motion was. I described to him – and I think I basically told him what the allegations were, and I said, "Detective, you need to understand the defense is alleging that these tire tracks that were referred to in your search warrant never existed at all. In fact, they were –" I'm not sure what term I used – maybe a figment of the deputy's imagination, that they had lied, that they had made up the fact that they had seen these tire tracks.

And I remember his response to that because I wrote it down. His response upon me telling him what these allegations were was, "Well, that's what they told me," referring to the deputies. It was almost like, "Well, I'm washing my hands of this, because I'm only relying on what these Deputies Simpkins and Spitulski told me."

Q. At that time, had you actually seen a copy of the motion to traverse that was filed by the defense attorney?

A. I think it was in our file, yes.

Q. Anything else that was said by you to Detective Walls and by Detective Walls to you, that sticks outs in your mind?

A. Not at that time, but I did have another phone call, interview or conversation with him, a few days [73] after that.

Q. But at that initial conversation with him, did you mention anything about the driveway versus accessway also?

A. I don't know.

Q. What was the next thing that you did?

A. In fact, I don't think I told – I don't think I talked to him until after I completed my first memo.

Q. So –

MR. BECERRA: I'm sorry. I didn't hear his answer. Is he saying, I didn't talk to him on this phone call before the first memo?

(Answer read.)

Q. BY MS. LEE: So your first conversation with Dr. Walls was after you wrote that March 2nd memo?

A. I believe so, but I'm not positive. I know we were trading phone calls back and forth, and I know we had two conversations. I'm just not sure of the timing.

Q. Obviously, by the time you wrote the March 2 memo, you had drawn the conclusion that there were problems with the search warrant?

A. Yes.

MR. BECFRRA: Objection. Vague and ambiguous as to the term "problems."

Q. BY MS. LEE: I'm just trying to find out what [74] things between the time that you had the initial conversation with Mr. Escobedo and the time you actually prepared the March 2 memo; what had transpired to lead you to that conclusion? And we've been going over going to the scene.

A. Right.

Q. And after that, you still had not made a conclusion about the search warrant?

A. I think what I did is after I made the on-site inspection, I came back to the office, and I started talking to my colleagues, my other deputy D.A.s, and asked them their opinions, and I showed them the photographs, and a couple of them, I think, I even had them sit and watch the videotape, and I gave them the factual scenario, and I said, "What do you think?" And you know, every single one of the people I asked said, "Yeah, there's a problem with this warrant."

And I think at that point, that's when I brought in your clients, Carol Najera and Frank Sunstedt. I don't know if I did it with both of them or together or separately, but I showed them the videotape. I showed them the photographs. I told them what I saw, and they basically said, "Yep, there's a problem."

Q. Other than Carol Najera and Frank Sunstedt, who else did you show the pictures and the videotape to and

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[87] until it was resolved one way or the other, which is normal practice. We do that all the time. I may have assigned a case to a younger deputy, an evidence problem arises, and I'll take the case back from that deputy and resolve it.

Q. BY MS. LEE: How long was this initial conference, or conversation, with Ms. Najera and Mr. Sunstedt?

A. It wasn't short because I remember I had to explain to them the facts of the case. I had to show them

the photographs and show them the videotape, so it took a little bit of time. Not – I wouldn't say an hour. Half hour, maybe less.

MS. LEE: Lets go off the record.

(Recess was taken from 12:43 p.m. to 1:38 p.m.)

MS. LEE: Back on the record.

Q. What was the purpose of your March 2, 2000, memo, the memo to Frank Sunstedt?

MR. BECERRA: Objection. Lack of foundation.

THE WITNESS: It basically was the disposition report, or was going to be the disposition report for dismissing the case.

Q. BY MS. LEE: And that's just to memorialize what – strike that. So a disposition memo that recommended dismissal of the case?

[88] A. The disposition report is essentially an explanation as to why a case is being dismissed or has been dismissed.

Q. And you wanted the case to be dismissed?

A. That was my recommendation.

Q. Who did you send the memo to?

A. Frank Sunstedt.

Q. Was he the only person?

A. Yes.

Q. What response did you receive from him?

A. You know, I actually prepared the memo, and he edited it about two or three times. He wanted me to take – change some language, some wording. He wanted the tone of the memo to be less accusatory because he told me he wanted to send it to the sheriff's department to explain – so they would know the reason why we were dismissing the case.

Q. Had you done disposition reports before?

A. Yes. All – any cases we've ever handled, we do a disposition report.

Q. And so it was customary to give it to the head deputy to review?

A. The disposition report always must go to the head deputies because they have to sign off on it.

Q. Was it unusual that Mr. Sunstedt was requesting

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[90] A. No, not when I wrote it, no.

MR. BECERRA: Objection. Motion to strike. calls for speculation, also an opinion, also a conclusion.

Q. BY MS. LEE: So in preparing the March 2 memo, it wasn't your intent to make accusations about any of the detectives involved in the Cuskey case?

MR. BECERRA: Objection. Vague and ambiguous. Calls for conclusion also.

THE WITNESS: My intent was to explain the reason for the dismissal or the request for a dismissal.

Q. BY MS. LEE: How did you respond to Mr. Sunstedt's request to edit your disposition report?

MR. BECERRA: Objection. Vague and ambiguous as to the different requests for different parts. What part are you asking about?

THE WITNESS: I complied with his request. He explained to me why he wanted it done, and I did it.

Q. BY MS. LEE: What did he offer as an explanation of why he wanted the editing done?

MR. BECERRA: Objection. Asked and answered.

THE WITNESS: He said because he intended to send it to the sheriff's department, he wanted to tone down the language of the – tone down the accusatory tone of the memo.

Q. BY MS. LEE: So you redrafted a whole new memo?

[91] A. No. I didn't redraft it. He made – on the draft I provided to him, he took a red pen, or some other colored pen, and made some crossings out, inserted some additional words, and then gave that back to me and said, "Make the changes." And I just made the change on the computer.

Q. Do you know what happened to that initial draft that you prepared that was edited to Mr. Sunstedt?

A. It was destroyed by myself.

Q. So today, do you have anything in writing that would accurately reflect what your original March 2 memo

reflected prior to Mr. Sunstedt making those proposed changes?

A. No.

MR. BECERRA: Would that include your log? Are you including that log we turned over?

THE WITNESS: I don't know if it's reflected in there. I don't think so.

Q. BY MS. LEE: At some point, you prepared the final March 2 memo which was approved by Mr. Sunstedt, correct?

A. Well, he signed off on it, so I took it as an approval, yes.

Q. What happened to the memo after that?

A. He told me that he was going to have it faxed [92] over to the sheriff's department, to the captain of Industry station.

Q. Did you have any response to that?

A. No.

Q. Did you have any problems with him doing that?

MR. BECERRA: Objection, vague and ambiguous.

THE WITNESS: No.

Q. BY MS. LEE: What happened to the Cuskey case after that?

MR. BECERRA: Well, objection. Calls for narrative, also calls for a conclusion.

THE WITNESS: I think within a day or so, the case was up for a hearing. I'm not sure what the nature of the hearing was. Frank Sunstedt had already received the calls from the captain of the Industry station asking for a meeting.

I advised Frank Sunstedt that there was still a defendant in custody, and I think that was Defendant Ojala, and Frank Sunstedt authorized, or gave me, the go-ahead to obtain his release from County jail pending the meeting with the sheriff's department.

Q. BY MS. LEE: So there was supposed to be a meeting with the sheriff's department prior to the hearing scheduled on the Cuskey case?

A. Prior to the scheduled motion to traverse.

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[97] statements, other than the formalities of exchanging who everybody was?

A. Pretty much.

Q. Did you guys have a copy of your memo there?

A. Yes, I believe we all did. I know the sheriff's department had it, or the lieutenant and the captain. I even think Detective Walls had a copy.

Q. And then at some point the conversation went from Walls and Sunstedt to the captain, correct?

A. No, Lieutenant Barstow.

Q. What was he saying?

A. Lieutenant Barstow turned towards me and basically started kind of ranting and raving, raising his voice saying, "I don't know who he thinks he is. He's not a prosecutor. He's acting more like a defense attorney. He's acting more like a public defender, and I want him off this case."

Q. Did anyone provide a response to that?

A. No. The defendants just sat there. I tried to.

Q. What do you mean you tried to?

A. Well, I tried to speak up, and Defendant Najera, who was sitting towards my left, kind of just put her hand on my arm and just said, "Just let him talk."

Q. What were you going to say?

A. You know, probably just yell back at him, like, [98] you know, "Who are you calling a public defender? Who are you calling a defense lawyer?"

Q. So Lieutenant Binkley –

A. No, Lieutenant Barstow.

Q. Sorry. Lieutenant Barstow just made this comment towards you?

A. It wasn't so much a comment as an attack, personal attack.

Q. Personal attack, and it wasn't prompted by anything?

A. No.

MR. BECERRA: Objection. Calling for conclusion. Lack of foundation.

Q. BY MS. LEE: So just prior to him attacking you verbally like this, what occurred?

MR. BECERRA: Objection. Lack of foundation, if anything occurred.

THE WITNESS: Nothing occurred. It was just – Detective Walls finished whatever he was saying, and then Lieutenant Barstow started speaking, and he just kind of turned his chair – he didn't turn his chair, his body in his chair in my direction and started making the accusations, or the attack.

Q. BY MS. LEE: So nobody at this meeting said anything to personnel at the sheriff's department about, [99] "Well, how do you explain this?" or, "How do you explain that?" Things that were reflected in your memo?

A. At this point, no.

Q. Yes?

A. No.

Q. No? What else occurred at the meeting?

MR. BECERRA: Well, let me object. Calls for a narrative.

THE WITNESS: After Lieutenant Barstow said the things he said, and I said a couple things to him, I think that's when Captain Binkley spoke up.

Q. BY MS. LEE: What did you say to Sunstedt and what did he say to you?

A. I didn't say anything to Sunstedt. I think I said it to Lieutenant Barstow.

Q. What did you say?

A. Lieutenant Barstow was saying, "Why don't you guys just put the case on? Let the judge decide. Let the jury decide who's telling the truth, if the detectives and the deputies lied." And my response to him was, "We're not potted plants here. We have to make an independent decision as to whether or not to go forward with the case. We just don't throw cases in front of judges and juries just because. We're here for a purpose."

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[103] talking about the motion to traverse. What is the defendant's burden on the motion traverse?

MR. BECERRA: Well, let me object again. That calls for expert opinion. Are you asking in general, or are you asking on this particular case?

MS. LEE: Generally.

MR. BECERRA: Then same objection. He's not a designated expert. Are you saying he's an expert?

Q. BY MS. LEE: You can answer.

A. They have – the motion to traverse goes underneath the warrant, as opposed to motion to quash, which is an attack on the four corners, or the face of the warrant.

Motion to traverse is basically an attack upon – it almost assumes that the warrant on its face is valid if you read everything on the warrant as is, but when you traverse a warrant, you're saying there are statements in this warrant, or there are omissions in the warrant, which if the judge who signed the warrant and reviewed the warrant had been made aware of them, that he would not

have signed the warrant, and that these omissions, or these statements, were done deliberately or in reckless disregard of the truth, so the burden is on the defense.

Q. And they can satisfy that burden by presenting [104] evidence in the form of witness's testimony, documents, that kind of thing?

A. Yes.

Q. And if a criminal defense attorney prevails on a motion to traverse, then what happens to that case?

MR. BECERRA: Objection. That's an incomplete hypothetical, and also calls for speculation and a conclusion.

THE WITNESS: Well, it depends. If the motion to traverse is granted, it doesn't necessarily mean the end of the criminal case. What you look for, and what I tried to do in this case, to see if there is any other possibility to justify the search warrant under any other exception.

And I've done that before. I've had a warrant quashed or traversed and still managed to proceed on the case, but I looked at this case to see if there was a way around the warrant, and there just wasn't.

Q. BY MS. LEE: At this March 9 meeting, it's your recollection that nobody confronted Detective Walls about the allegations that you made in your disposition report?

MR. BECERRA: Objection. Calls for a conclusion, and I object as to the form of the question, also argumentative.

THE WITNESS: Correct. He really wasn't questioned [105] at all in any detail. He did most of the

talking as to why he did – why he thought we were being hypertechnical.

Q. BY MS. LEE: Did you say anything else during this meeting?

A. I didn't say much at the meeting, other than what I already indicated.

Q. Did Mr. Sunstedt say anything during this meeting?

A. Yes. I mean, I know there was another exchange between Detective Walls and Defendant Sunstedt, and then either before that or just after that is when Captain Binkley brought up the issue that he wanted the case to go forward because he was fearful that the defendant would file a lawsuit against the sheriff's department, especially since they filed a lawsuit previously.

Q. You mentioned there was another exchange between Walls and Sunstedt?

A. Yeah.

Q. What was that about?

A. Same thing. It was basically the same thing.

Q. About Walls saying – criticizing your allegations?

A. Walls never really directed his attention

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[107] to let a judge or jury decide, other than what you testified to in terms of you responding?

A. No.

Q. Did anybody respond to captain Binkley's comments about his concerns about being sued?

A. No. Oh, you know what? I may have said something along the lines of, "Captain, that's not our concern. That's not one of our concerns."

Q. Anything else said by anybody present at the meeting?

A. Regarding that issue?

Q. Anything else.

A. No.

Q. Other than what you testified to.

A. No.

Q. How long did the meeting last?

A. 15, 20 minutes. I'm not positive.

Q. Were any voices raised during this meeting?

A. Yeah, Lieutenant Barstow's, maybe mine, and Detective Walls'. Although I don't know if his voice was raised like Lieutenant Barstow, but clearly upset.

Q. Was there any type of understanding that was, or agreement, that was reached after the meeting?

A. Yes.

Q. Let me rephrase. From the meeting, was there an [108] understanding or agreement reached about how this Cuskey case would be further handled?

A. At the conclusion of the meeting, it was understood that the case would proceed to the motion.

Q. What was the basis of your understanding?

A. Something that Frank Sunstedt said to – I don't know if he was directing it to either the lieutenant or the captain or even the detective, but there was something he said. I don't remember the exact words, but, "It's going to go forward with the – we'll go forward with the hearing."

Q. Did he indicate why?

A. No.

Q. And prior to this meeting, was it your understanding that the case was not going to go forward to a hearing?

A. Absolutely. It was my understanding the case was going to be dismissed.

Q. Did you respond in any way to Mr. Sunstedt's comments about the case going forward with the hearing?

A. Yes. After the meeting was over and the sheriff's department had left, I confronted him.

Q. Who was present?

A. I believe it was just myself and Defendant Sunstedt.

[109] Q. Is that the conversation that we discussed earlier?

A. Yes.

Q. And did you remember anything else about what Mr. Sunstedt said in response to your statements?

A. When I made the accusations?

Q. Correct.

A. No. No. The majority of what he did was stare at me.

Q. During the break, did you have an opportunity to review any other documents, anything else in preparation for your deposition?

A. No, just ate.

Q. So you haven't taken a look at your journal?

A. No.

Q. When was the last time you looked at your journal?

A. It's been some time.

Q. Couple of months?

A. Probably longer than that; probably when I went through the grievance hearing.

Q. What complaints do you have, or criticisms, about how you were treated during this meeting, if any?

MR. BECERRA: Objection. Compound.

THE WITNESS: Well, clearly I think my supervisors, [110] the defendants, should have interjected when Lieutenant Barstow began his personal attack on me. I don't think his attack was at all professional. It was unwarranted. It was uncalled for. It was just simply unprofessional, and either one of them should have stood up and said, you know, "Lieutenant Barstow, you're out of line here. We're all professionals here. Let's deal with this in a professional manner." But they didn't; they just sat

there and allowed this tactic to go on, and when I attempted to respond, I was quieted down by Defendant Najera.

Q. BY MS. LEE: Any other criticisms or complaints?

A. Well, yeah, when – I mean, other than trying to quiet the lieutenant down, they should have simply responded, "Hey, wait a minute. Don't come in here accusing one of our prosecutors of being a defense attorney. He's a prosecutor. He has an obligation, okay? That's a lot different from your obligation to arrest people. Our obligation is different. We're bound by ethical constraints. You may not understand them, you may not appreciate them, but we're guided by a different set of rules than you are. So that's the only reason why he's doing what he's doing. If you have a problem with that, that's fine, but express that in a professional manner."

* * *

[114] drawn conclusions from speaking with the affiant, who had visited the scene of the incident, and when you have a D.A. that draws conclusions and forms an opinion to that extent, and then is subpoenaed by the defense to testify on behalf of the defense, there's now a conflict within the D.A.'s office.

Q. When were you subpoenaed by the defense on the Cuskey matter?

A. Maybe a week after the meeting with the sheriff's department, maybe less.

Q. You were personally served with a subpoena?

A. Yes.

Q. Did you at any time prior to the motion to traverse advise the criminal defense attorney on the Cuskey matter of your opinions relating to the search warrant?

A. Yes. At the hearing in which Defendant Sunstedt had authorized me to seek the release of Defendant Ojala, we couldn't find Defendant Ojala's lawyer, so I had Mr. Escobedo – or I requested Mr. Escobedo to stand in for that defendant, so I could get him released pending the outcome of the meeting and the matter overall, and I explained to him why I was doing what I was doing.

Q. And what did you specifically tell him?

A. That after speaking – well, after reviewing the

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[120] Q. What was their response and reaction, if any?

A. I remember Defendant Sunstedt stating something along the lines, "Yeah, I expected that."

Q. Any other response or reaction from him?

A. No.

Q. What about Ms. Najera?

A. I don't recall any reaction at all.

Q. Did you have any other conversations or contact with either Sunstedt or Najera between the time that you notified them that you were subpoenaed and the time of the motion to traverse hearing?

A. Yes, a couple of occasions with Defendant Najera. The first one dealt with providing copies of my memo to

the defense attorney. I explained to Ms. Najera that there was information in my memos, both the March 2nd memo and the March 6th memo, which were discoverable and should be turned over to the defense prior to any motion.

Q. What were the circumstances surrounding this suggestion?

A. When I informed her that it was my opinion that the memos were discoverable and should be turned over to the defense, Defendant Najera ordered me to prepare a new memo which contained only statements that Detective Walls had said to me when I interviewed him on the telephone [121] and to omit any and all other information.

Q. How did this conversation come about? In other words, did you just run into Ms. Najera and you said, "Oh, by the way, I think the memo should be turned over," or did she approach you about the memo? I mean, how did that come about?

A. I think shortly after I had advised them I had been subpoenaed, maybe that same day, if not, the day after, I approached Defendant Najera and indicated – or told her that these memos should be turned over to the defense.

Q. What was Ms. Najera's response to your suggestion?

A. As I stated, she told me to prepare a new memo containing only the statements of Detective Walls and to omit all other information contained in my memos.

Q. What was your response to that?

A. I told her I didn't believe that was appropriate. I told her I believe the appropriate course was to redact or black out the objectional – not necessarily the objectional part, but the portions of my memo that were clearly work product, and after redacting or blacking out those portions, to then turn over that portion to the defense in its present form so that the defense would clearly know that there had been some [122] redaction, and that would permit the defense to at some point later on request through the judge access or, at least, an in camera review of those redacted forms.

I don't believe creating a new memo altogether was appropriate because the defense would not – if we just gave the defense the new memo, they wouldn't have had any idea that there was other information that was contained in the original memos or that there was even original memos. They would believe that this new memo was the only document prepared in the course of this case.

Q. What was Ms. Najera's response to that suggestion?

A. She told me I was wrong and ordered me, again, to prepare a new memo.

Q. What was your response there?

A. I basically said the same thing, and we want [sic] back and forth. I told her I didn't believe it was ethical for me to do as she suggested. She seemed to brush that aside and ordered me to prepare the new memo as she told me to, and I just flat out told her that I would not do that.

Q. Was there a resolution of this in any shape or form?

A. She told me that she would make contact with

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[124] that you had been subpoenaed, and the time of the actual hearing?

A. Few days, maybe about three or four days before the hearing, she called me into her office. She began discussing the case again. She began to once again restate her opinion that what had occurred in this case was simply an innocent mistake, and that she didn't understand why I was still the position that these deputies had lied, had deliberately lied on the search warrant.

And she asked me to once again restate my basis for my opinion. I explained to her – again, I restated the basis for my opinion. We went backwards – no, we didn't go backwards. We went back and forth. It just was clear that we were going in a circle.

I finally told her, "Carol, you have your opinion; I have mine. But you need to know that if I'm asked my opinion when I'm up on the stand about what I believe happened in this case, I will state that I believe these deputies lied on this warrant." And when I told her that, she kind of leaned forward in her chair, and she was sitting at her desk. She just kind of was shaking her head from side to side and she said, "You know, if you keep thinking like that, talking like that, you're going to get yourself in trouble with this [125] office."

Q. What was your response to that?

A. I didn't respond. I just kind of sat there, and I just kind of looked at her, and I think if anything, I shrugged my shoulders and said. "Is that it?" And I walked out.

Q. What prompted this meeting?

A. She called me into her office for something.

Q. Specifically to discuss this case?

A. I don't know if we discussed other things before we discussed this case, but the majority of our conversation was this case.

Q. How did you perceive her comment to you about you possibly getting in trouble with the office?

A. I perceived it as a threat. I perceived it as an attempt not only to dissuade me from testifying as I stated that I would testify if I were asked for my opinion as to the whether or not these deputies lied, but I took that simply as a threat, Don't say what you're telling me you're going to say. Because if you do say that, there's going to be retaliation. We will retaliate against you, this office rather. This office will retaliate against you.

Q. Did what she have to say persuade you in any way?

* * *

[130] Q. Prior to your testimony in the motion to traverse in the Cuskey matter, did you make the decision that you were going to be truthful, or were you still waffling at the time because of statements that allegedly were made by Ms. Najera?

MR. BECERRA: Objection. Vague and ambiguous. Misstates his testimony.

THE WITNESS: I think I – from the time she made those statements to me, I was vacillating back and forth about what I would do. Maybe the day before, if not

the day of the hearing, I finally told myself that regardless of the consequences, I was going to tell the truth.

Q. BY MS. LEE: Other than Mr. Grosbard, did you advise anybody else, or discuss with anybody else, the conversation that you had with Ms. Najera wherein she allegedly made the threat to you?

MR. BECERRA: Objection to the extent it calls for attorney/client privileged information.

THE WITNESS: You're talking up until the time of the hearing?

Q. BY MS. LEE: Right.

A. No, I don't believe I did.

Q. The motion to traverse was before Judge Milton, correct?

A. Yes.

[131] Q. And that was the judge that you had been assigned the calendar deputy?

A. Yes.

Q. And at the time of the motion to traverse hearing, you were still his calendar deputy?

A. Yes.

Q. What was your relationship with Judge Milton?

A. Professional.

Q. Same mutual respect?

MR. BECERRA: Objection. Calls for speculation. Calls for conclusion.

THE WITNESS: I don't know what he thought of me. I mean, I thought of him as a prosecutor-turned judge. He was a good judge for the prosecution.

Q. BY MS. LEE: Did you ever go out to lunch with him, have any social conversations with him?

A. I think we may have – we may have gone to lunch as a group with the court staff for birthdays, maybe even like a Christmas lunch, but it was always with a group. I mean, with other court staff, other public defenders, maybe even other D.A.s. We never went anywhere one on one.

Q. Prior to this motion, did you respect him?

A. That's a tough question. I gave him the respect that he was due, given his position. I didn't know him

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[134] him and you formed the opinion you should not win on the merits, but you ended up winning anyway?

A. No.

Q. So you were truthful in your testimony in the motion to traverse?

A. Yes.

Q. What was the ruling of the court?

A. I wasn't present during the ruling. I just found out afterwards that he had denied the motion to traverse.

Q. What was the ultimate disposition of the Cuskey case?

A. I don't know, because I didn't have it. I believe one defendant went to trial and was convicted. Although, I think he was placed on probation. I don't think he went to jail, and I believe the other defendant pled guilty, but to what, and what the disposition was, I don't know.

Q. Do you know which defendant was Mr. Escobedo's?

A. Escobedo.

Q. Escobedo's client?

A. No, I don't remember.

Q. So you don't know if his client actually went to trial or was convicted or he had pled guilty?

A. I don't know. I didn't have anything to do with [135] it.

Q. During the hearing before Judge Milton, is it your opinion that Judge Milton made any inappropriate comments or statements?

MR. BECERRA: Objection. Calls for a conclusion.

THE WITNESS: Not when I was present in the courtroom on the stand, but I was excluded during the majority of the hearing.

Q. BY MS. LEE: Just during your rendering of the testimony.

A. I don't think he even said anything, if he did.

Q. Do you know what evidence was presented by the defense in support of their motion to traverse, other than yourself?

A. No.

Q. So you don't know who testified and what testimony was given in relationship to the motion to traverse, other than your own testimony?

A. I know the other deputies were there, Deputies Simpkins, Spitulski, and Detective Walls, but what they said on the stand and who put them up there and what they asked them, I don't know.

Q. I think we started with a list of the events or conduct that you perceived to be retaliatory by Mr. Sunstedt as well as Ms. Najera. I think we left off [136] with Mr. Sunstedt, the comment that he made to you shortly after the March 9 meeting that you would no longer be a calendar deputy.

A. Right.

Q. Did he indicate when that position would end?

A. No, he didn't. He kept it kind of open because of – apparently there was a – well, this consolidation of the master courts was going to occur in April, and there was somebody transferring in – maybe transferring out. I forget which. That it wasn't going to happen until sometime after the consolidation was up and running.

Q. So to – I'm sorry. Were you going to –

A. I'm done.

Q. To your knowledge, were you the only one who was advised prior to the consolidation that you would no longer be a calendar deputy?

A. Of the four calender deputies?

Q. Correct.

A. Yes, I was the only one.

Q. So prior to the consolidation, there were four calendar deputies?

A. Yes.

Q. And of those four calendar deputies, what grades were they?

[137] A. Two of them were Grade 4s and myself, and another individual, Grade 3.

Q. And after the consolidation, how many calendar deputies remained?

A. You still had four.

Q. Four calender deputies?

A. But two calendar deputies per courtroom.

Q. So the same calendar deputies after consolidation?

A. Initially, yes.

Q. And which courtroom were you assigned to?

A. To Department N, as in Nancy, which would be Judge Hunt, H-u-n-t.

Q. And that's, I think, what you classified as like a backup calendar deputy?

A. Yeah, the Grade 4 was your primary deputy. The Grade 3 was – I wouldn't say backup calendar deputy, because each calendar deputy operated differently, but clearly the Grade 3 is junior to the Grade 4.

Q. And who was your senior calendar deputy?

A. Michael Grosbard.

Q. And who were the other two calendar deputies after the consolidation?

A. Deborah Passow, who was a Grade 4, and Donald Clem, who was a Grade 3.

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[139] Q. And did that other Grade 3 calendar deputy also become a trial deputy?

A. No. Donald Clem remained as a calendar deputy.

Q. So at the time that you left Pomona for your new assignment in El Monte, I think you said it was August or September –

A. Yes.

Q. – 2000, Donald Clem was still a calendar deputy in Pomona?

A. I know at some point Donald Clem was actually transferred to another bureau. I believe he went to either auto insurance fraud or – he went to one of the fraud units, but the person that took over for Donald Clem was another Grade 3, and her name was Amy Kuhner, K-u-h-n-e-r.

Although, I know she just got married, and she changed her last name. I don't have any idea what her last name is.

Q. When you became a trial deputy, was there somebody who replaced you as a calendar deputy in – I think you said in Department N?

A. Yes.

Q. And who was it?

A. Kathy Cady, C-a-d-y.

Q. Was she a Grade 3?

A. Yes.

[140] Q. Other than reduced – I guess the – I don't know if you would call it that because you said there were four calendar deputies before the consolidation and there were four calendar deputies after the consolidation?

A. Right.

Q. Was there anything that changed once the consolidation occurred at the Pomona branch with regards to the D.A.'s office?

MR. BECERRA: Objection. Lack of foundation.

THE WITNESS: With respect to the entire Pomona D.A.'s office.

Q. BY MS. LEE: Yes, the Pomona D.A.'s office in terms of – when you had that subtle change where I think before the consolidation you had four calendar deputies at four different departments.

A. Right.

Q. And then after the consolidation, you had two calendar deputies in two departments.

A. Correct.

Q. Any other changes in the D.A.'s office after the consolidation?

A. Well, the consolidation, I mean, affected everyone, because instead of staffing four courts with trial deputies, you're now staffing two courts with trial [141] deputies, so your trial deputy pool has doubled in size, if you will, but so did your case loads. Whereas before, you weren't – the calendar courts weren't concerned with what we call municipal matters, felony arraignments, preliminary hearings, but after the consolidation, those calendar courts became responsible for those matters, not only the initial official felony arraignment, but the preliminary hearings.

The calendar – consolidated calendar courts pretty much started everything off from the time of filing to the time of trial.

Q. What was the next retaliatory conduct by Mr. Sunstedt?

A. Well, I'm not sure if it was his decision or Defendant Najera's decision, but I had a murder case that I had been assigned probably – if not late 2000, maybe early 2001 – not 2001. If not late 1999, then early 2000. I think it had to be – I'm not exactly sure when it happened.

I remember Defendant Najera came to my office and asked me if I had any open murder cases. I informed her I had this one. I can't remember the defendant's name right now. She told me that they were looking to give murder

cases to the Grade 2 deputies, and if I had any cases, any murder cases, that they could handle.

[142] I told her I had the one. She inquired what it was about. I told her the basic factual scenario, and I believe she inquired as to whether or not she thought a Grade 2 could handle it. I don't know if she mentioned the name in particular, or just said, can a Grade 2 handle it?

And I remember saying that it would pose a problem for some – a Grade 2 that didn't have a murder case because it was a murder based upon an implied malice theory, which is a difficult theory for judges, let alone juries to understand, that it takes some time for a prosecutor to understand it so they could explain it to the jury, and I don't think it was a good case to give someone that had no murder experiences.

Even though I explained that to her, she went ahead and took the case and reassigned it to the other D.A.

Q. Did she tell you why she was looking for a murder case for a Grade 2?

A. Just that they were looking to give it to Grade 2s for experience, I would assume.

Q. Do you know which Grade 2 she was referring to?

A. When she initially asked for the file, I don't believe she mentioned names, but I'm not positive, but I know who it eventually went to, and that was [143] Steve Gallon.

Q. Was it your understanding that you were the only one that she approached with regards to a murder case?

A. To take the murder case and give it to someone else?

Q. Right, to a Grade 2.

A. Yes. That was my understanding; I was the only one.

Q. And to your knowledge, you were the only one during that time who Ms. Najera took a murder case away from to give to a Grade 2?

A. Yes.

Q. Was there anything else about the case, the murder case that was reassigned to the Grade 2, that you believed was inappropriate to be tried or handled by a Grade 2?

A. Other than the fact that it was too complicated for a Grade 2 deputy with no murder experience to try, no.

Q. I guess my question more so is: Other than the malice theory that you mentioned, was there anything else about that case that was complex such that it just wasn't appropriate for a Grade 2 to try?

A. It was a murder case that every single witness, including the victim, was involved in either the use of [144] or involved in the sales of methamphetamine.

It was a case where the victim was murdered probably in view of maybe five or six people. All those people told different stories. Some of those people were involved in disposing evidence after the murder. One of the witnesses had been given immunity for his testimony, and even after given immunity, still was not telling the complete and total truth.

It was going to be a murder case where none of the witnesses, with the exception of the police officers, none of the witnesses were going to be cooperative, were going to tell the complete truth. It was a case where you would have to what we call green the witnesses and basically get in their face and argue to a jury that, "Ladies and gentlemen, all these witnesses are going to lie to you in one way or the other, but the truth will be that this defendant committed murder." That takes some experience to do.

And it takes not only time in the office, but having a background from doing murder cases where not only can you make that argument, but then you have to make the leap into why it's an implied malice murder, and that takes some time.

Q. And up to that point, had you actually greened any witnesses on this case?

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[146] for a conclusion.

THE WITNESS: Steve is a good lawyer for the level of experience that he had at the time. He did a lot of trials. I believe he got some favorable verdicts, but he was still learning, and I could see that in supervising him, and, yes, if I was told beforehand that they were going to give it to him, I would have said, "Look for another murder case to give him. This is not the type of case to give him." He was not ready for that type of case.

Q. BY MS. LEE: The fact that a murder case was taken from you to be reassigned to another deputy D.A., did that adversely impact you?

A. Our ability to be promoted in the office depends to a certain extent on the number of murder cases that you try. Obviously, the more murder cases you try, you stand a better potential of being promoted, so it is very important for a D.A. to try as many murder cases as possible.

So by taking the murder case away from me, they were taking that potential for me to promote, and by not assigning any new murder cases to me, that also prevented my ability to promote.

Q. But that's not an uncommon thing at the D.A.'s office, is it, which is to take murder cases from one [147] prosecutor and assign them to somebody else?

MR. BECERRA: Objection. Lack of foundation. Incomplete hypothetical.

THE WITNESS: Actually, I think it is. I think it is.

Q. BY MS. LEE: So you haven't heard of a situation prior to your own experience where the D.A.'s office took a murder case from one prosecutor and gave it to another prosecutor?

MR. BECERRA: Objection. Argumentative as to form.

THE WITNESS: Not against – not without the prosecutor's consent. I mean, I've taken over murder cases because somebody is either being transferred or they're so bogged down in other work that they simply can't try it, but never have I either received a case or had a case taken from me just to give to somebody else for more experience.

Q. BY MS. LEE: So you never heard of a situation in the D.A.'s office where you may have a Grade 2 who is about to go to Juvie or another assignment and wanting to give them murder trial experience before they left?

A. Not involving taking the murder case from another D.A., no. Maybe giving one that just started, but not taking one from another D.A.

Q. What is the next retaliatory event or conduct by [148] Ms. Najera or Mr. Sunstedt that you recall?

A. Aside from taking the murder case, they didn't assign me any new murder cases.

Q. By the way, approximately when was this when Ms. Najera took the murder case away from you?

A. I don't remember. It would have been – I don't know if it was before the hearing or after the hearing. I just I don't remember.

Q. Was this when you were still a calendar deputy or trial deputy?

A. I think I was still a calendar deputy, but calendar deputies were permitted to carry murder cases.

Q. And how many murder cases did you have at the time?

A. I think that was the only one that I was carrying.

Q. While you were at the Pomona office, how many new murder cases would you be assigned on, let's say, a given year?

A. You know, it just depended on the murder rate in Pomona, and I don't know what the murder rate was back then.

Q. Were you aware of lots of murder cases being filed during that time?

MR. BECERRA: Objection. Vague and ambiguous.

[149] THE WITNESS: I don't know.

Q. BY MS. LEE: So you don't know if the reason why you weren't being assigned any new murder cases wasn't because there weren't enough to go around versus you weren't being assigned because it was in retaliation?

A. I know there were other murder cases being assigned, were being assigned to other D.A.S.

Q. How many murder cases?

A. I don't have the number. I don't know.

Q. Do you recall which new murder cases were being assigned to which deputy D.A.?

A. No.

Q. How did you become aware of these?

A. Just from working in the office.

Q. Did you bring that to somebody's attention?

A. No.

Q. Did you ever question why it was that you weren't being assigned new murder cases?

A. I questioned myself. I may have raised it with some other deputies, but I never questioned Defendant Najera or Sunstedt.

Q. When was the last time you were assigned a new murder case before leaving the Pomona branch?

A. It would have been the case that was given to Steve Gallon. That was the last one, and that would have [150] been – I believe the murder was in 1999.

Q. And when was that trial set for; do you recall?

A. That had many settings. I don't think we – I don't think we did the prelim until maybe late 1999, maybe early 2000, so it was still – it may have been in the pre-trial stage. I'm not positive. I don't know when it was actually set for trial.

Q. At the time that that murder case was taken from you, were you aware of any other murder cases pending that would have been more appropriate for a Grade 2?

A. No, I wasn't aware of any of the murder cases floating around.

Q. What's the next incident or event of retaliatory conduct by Ms. Najera or Mr. Sunstedt?

A. It probably would have been the denial of the promotion to Grade 4.

Q. When did you apply for the promotion?

A. I believe they had the test sometime in 1999, maybe November, October 1999. It took them awhile to grade it, and I think the first – maybe the first list came out, in terms of what band you're in, sometime early 2000.

Q. How did you do?

A. I did well. I was Band 1.

Q. Was this a written test?

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[156] Q. Do you know their names?

A. Manny Garcia, Kathy Cady, Don Clem – I can't think of the name of the other person.

Q. Do you believe that you were more qualified for the Grade 4 promotion than any of the other four that were promoted?

A. Yes.

Q. Who?

A. Don Clem and the other name of the person I can't remember. I know it's a female. I can't think of her name.

Q. Why do you say that?

A. I'd been in the office longer and had more experience. I think it's – to the female, I don't think she's ever been a calendar deputy. I don't think she had anywhere close to the number of trials I had done.

Q. Other than the number of trials and being a calendar deputy, is there anything else that classifies more experience?

A. Well, I had also worked in the special unit, which is a class, and I also was then and still am, an instructor

Q. At the time that you received your scoring, how many trials had you done, had you completed?

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[159] A. It's a – I think initially it's about $10,000, but it does go up from that. I think top-step Grade 4 is maybe 130-, 140-.

Q. What were you making at the time that the list of promotions came out on August 25, 2000?

A. When the first list came out, or the first score, or when the promotion list came out?

Q. The promotion list of August 25, 2000.

A. I believe at the time I was probably – I believe I was maybe at 8,500 a month.

Q. You've gotten a raise since then?

A. It's a step raise. You get a raise every year.

Q. What do you currently make?

A. It might be – you know, I don't know. I think it's maybe 88-, maybe 9,000, but I'm not positive.

Q. Do you know what weight the written exam and the appraisal and promotability have compared to the evaluation that's done by the committee?

A. Well, the appraisal and promotability and the exam gets you one place. It gets you into the band, which is the list of potential promotees, if you will.

Once you get into that list or that band, then all that

within Band 1 that were eligible for [160] promotion; if not more.

Q. So it doesn't matter what your scores were then?

A. No, not at all.

Q. Would it be accurate to say that once you're in Band 1, it's a subjective criteria?

A. It is completely subjective once you're in Band 1.

Q. Do you go through interviews?

A. No, no.

Q. So it's really subjective based upon who happens to be sitting on the evaluation committee?

A. It's not only who's sitting, it's who is talking to the evaluation committee and what they're saying about a particular D.A. and whether or not that D.A. should be promoted or not.

Q. Do you know the specific names of individuals who were on the evaluation committee at the time that the August 25, 2000, promotion list came out?

A. I tried to find out during the grievance proceeding, and the office wouldn't tell me. I'm assuming it would be Gil Garcetti as one of them since he makes the final call. Other than that, I don't know.

Q. Prior to the August 25, 2000, promotion list coming out, were you aware of any comments made by Ms. Najera or Mr. Sunstedt to anyone on the evaluation [161] committee that may have affected your promotability?

A. I know that a week or a few weeks before the August 25th promotion that there was a phone call or some – maybe a series of phone calls – between the Downtown committee, I would assume, but dealing with the Grade 4, and Defendant Najera and Defendant Sunstedt, about who should be promoted or who they were pushing to be promoted. But in term of details of what was said, I don't know.

Q. How do you know that there was this discussion?

A. Somebody told me that Defendant Najera had told – I'm not sure if it was a he or a she – had told them that she had received, or that she and Frank had received, a phone call from the committee regarding who should be promoted and who shouldn't, and basically had these three or four choices on who to push for the promotion.

Q. You don't know the individual who gave you this information?

A. No.

Q. Male or female?

A. I believe it was a male, but I'm not positive.

Q. Another prosecutor or just a clerical person?

A. No, it was a prosecutor.

Q. Grade 3, Grade 4?

[162] A. No.

Q. Is there anything that you could look at or review that could refresh your recollection about who this person was?

A. I'd have to talk to people there in Pomona and ask them, "Did you tell me this?"

Q. Was this information conveyed to you only or in a group setting?

A. No. It was just conveyed to me through a phone conversation.

Q. In the context of, "Oh, by the way, the committee has contacted Carol Najera and Frank Sunstedt"?

A. Yeah, more or less.

Q. Do you know the names of the Grade 4s in the Pomona branch that were not promoted?

A. You mean the Grade 3s who weren't promoted to Grade 4s?

Q. Right. I'm getting confused. Do you know the name of the Grade 3s in the Pomona branch who applied for and did not receive the Grade 4 promotion who were in Band 1, other than you?

A. Chrissy Weiss, Margaret Moe, Ed Miller. Those are the only names that are coming to mind right now.

Q. Of those people that you mentioned, do you believe you were more qualified than any of them for the [163] Grade 4 promotion?

A. I had more experience than they did, yes.

Q. Again, by more experience? You mean based upon the number of felony trials that you had conducted and you were a calendar deputy and in your special units that had been assigned to you?

A. And also being an instructor for college, yes.

Q. So is there a recourse that a prosecutor can take once he or she is advised that she had been denied a promotion?

A. Other than, perhaps, Civil Service Commission.

Q. Within the D.A.'s office?

A. No. The Civil Service Commission is not within the D.A.'s office; it's separate and apart. I don't think there's anything within the D.A.'s office for dealing with promotions. In fact, I know there isn't because when I wanted to make it a part of the grievance – I'm not sure if it was Director George Knoke or Steven Sowders, S-o-w-d-a-r-s, who informed me that that would be a non-issue; we wouldn't even consider that.

Q. So you could not file a grievance with the Civil Service Commission with regards to the denial of your promotion?

A. No. I could do that with Civil Service

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[169] those cases once that warning comes out, if you will.

I think I also asked for the case involving these defendants, and specifically involving these deputies, be referred to and investigated by the office of Special Investigations Division, which at that time was the unit responsible for handling cases involving police officers.

I also requested that the matter with respect to Carol Najera's attempt to dissuade me as a witness be referred to the Attorney General's office for review. I asked that my

transfer to El Monte be rescinded, and I asked for the promotion.

Q. Why did you ask for some sort of implementation policy with the D.A.'s office regarding police misconduct?

A. Well, because of this case. Clearly we needed a policy. I remember one time – and I'm not sure whether I had a conversation when this was all happening with Frank Sunstedt, and I remember making the inquiry, "What do we do next? What's the next step?" And I remember his response was, "You know, I got to tell you, Richard, in my 25-plus years with this office, I've never come across this. I don't know what to do. I'm just kind of, you know, going as it comes to me."

So it was clear that we needed a policy on how [170] to deal with these cases; what D.A.s are supposed to do; who are they supposed to alert; what role the office takes; what is done with that information; if there's an investigation, what happens with the pending case. But also to ensure that D.A.s are encouraged to report cases – or report officers they suspect are being involved in wrongdoing; that the supervisors are not to take any action which would discourage that reporting; that the supervisors are also to take action when it appears that any law enforcement agency or official is attempting to intimidate a prosecutor from reporting the same.

Q. To your knowledge, prior to this incident with the Cuskey case, had there been any similar occasion where you had a prosecutor raise an issue of police misconduct within the D.A.'s office?

A. Sure. I think probably one that everyone knows about is the one with Rafael Perez. The D.A. raised the issue with him way back in 1995, 1996.

Q. Other than the Rafael Perez, which deals with the L.A.P.D., I'm talking about specifically with the people that you've worked for within the D.A.'s office. Any D.A. that you're aware of in your years at the D.A.'s office prior to the Cuskey incident, have you heard about a specific prosecutor bringing to the D.A.'s office the [171] same or similar kind of allegations relating to police misconduct?

A. Sure. I think that happens quite a bit.

Q. Can you name some prosecutors' names?

A. No. I mean, it's just things that you hear over the years that the D.A. suspects this cop is lying, but that would be, you know, the extent of my knowledge, in terms of, okay, so they informed somebody, and that was it.

Q. You just never knew what happened after that?

A. No, and I've never followed up with that. It was more small talk among prosecutors that other prosecutors have come across situations where they were in a situation where they believed a police officer lied or maybe planted evidence or committed some other form of misconduct, and they were taking action, but I never followed up as to what the result of the action was.

Q. But you mentioned that Mr. Sunstedt indicated to you that this type of stuff hadn't ever happened before, and your incident was kind of a novel issue.

A. Well, that's what he said.

MR. BECERRA: Let me object. Argumentative as to the form, and I don't believe there's a question pending.

Q. BY MS. LEE: There is.

A. Well, that's what he said. I wouldn't say I [172] necessarily believed him when he said that.

Q. So you didn't believe him when he said that?

A. I was surprised that somebody who had been in the office that long could honestly say that he's never been confronted with an issue of a police officer, or an allegation of a police officer, lying in a case. I mean, if he honestly believed that, then either he is completely incompetent, or he's just flat out lying.

Q. The other thing that you had mentioned in terms of what you wanted out of the grievance was that you wanted the retaliation by the defendants to cease.

What specific retaliation was still ongoing at the time you filed your grievance by the defendants?

A. I was in the El Monte area.

Q. So you wanted the reassignment – strike that. You wanted out of El Monte?

A. I wanted to go back to where I was working before any of this happened. I wanted to go back to an environment where I wasn't looked upon by the defendants as almost like a leper, if you will.

Q. So then you wanted the defendants to change their reaction when they saw you?

A. I didn't want the defendants to treat me as if I had done anything wrong. I wanted the defendants to realize what they had done was wrong. What I did was the

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[177] anybody else?

A. No. I asked him to interview three witnesses: the judge, Judge Milton; the court reporter, Sharon Fox; and one of the defense attorneys; and he didn't interview any of them.

Q. Did anybody else from the D.A.'s office testify during your grievance?

A. The only one that testified was Steven Gallon.

Q. Did he testify on your behalf?

A. I don't know if I called him on my behalf. I called him as a witness.

Q. So actually Mr. Knoke's denial was based upon a lack of sufficient evidence?

MR. BECERRA: Objection. Calls for speculation. Calls for conclusion.

THE WITNESS: No. I think he denied it because Gil Garcetti told him to deny it.

Q. BY MS. LEE: Why do you think that?

A. Because I think Gil Garcetti was going to do whatever it took to protect Frank Sunstedt, and to a lesser extent, Carol Najera.

Q. Other than your personal beliefs, do you have any other facts, evidence, to support your belief?

MR. BECERRA: Objection. Misstates –

THE WITNESS: That Gil Garcetti played a role in [178] denying?

Q. BY MS. LEE: Right, that Gil Garcetti instructed Mr. Knoke to deny your claim.

A. About two days before I was informed that the grievance was denied, I spoke up before the board of the Mexican-American Bar Association in Downtown, and at that meeting, I essentially told them my experiences about what was going on in this case and with the defendants, and that something needed to be done, and that the bar association needed to make contact with Gil Garcetti to ask him to become personally involved in the case, and to look into the matter as well as to immediately adopt a policy on how to handle cases where prosecutors suspect a police officer engaged in misconduct.

Q. This was an open meeting?

A. It was – I don't know if it was open. It was before their board. I don't know if you called it the board of trustees. It was before a board of probably about a dozen people.

Q. And this was – your grievance was denied on October 5th, and you said this was about two days beforehand –

A. Right.

Q. – So that would make it October 3rd?

A. Right.

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[180] He said that was fine, and basically, "I'm going to put you on the agenda to speak before the board." About an hour or two after that, I received a phone call from James Blancarte, B-l-a-n-c-a-r-t-e, who was the president of MABA at that time, land he told me that he'd received a phone call from Luis Rodriguez, and he wanted to get my version of what had occurred.

He wanted to make sure I was not a Cooley supporter, and that I was not going there for political reasons, and so I told him what had occurred, and he said, "Okay. I know Garcetti – " this is him telling me. "I know Garcetti. Do you mind if I try to personally intervene on your behalf with Garcetti and see if we can resolve the situation without the need for you to appear before the board?" And I told him that would be fine, and he said he would get back in touch with me.

Q. So you had the discussion with Luis Rodriguez before October 3rd about you wanting to go before the board about your issues at the D.A.'s office?

A. I'm not sure I wanted to go before – he asked if I would go before the board. I wasn't actually crazy about it, but I decided I would do it.

Q. Is that something that MABA considers, employment type of grievances?

MR. BECERRA: Let me object. Lack of foundation.

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[186] endorsement from MABA for whatever political office or seat, and I guess this issue concerning endorsing Garcetti came up.

Q. When you say "this issue," are you talking about your issue?

A. Well, from what Luis explained to me, I was going to speak just before the MABA board voted on whether or not they were going to continue to endorse Garcetti.

Q. Did you, in fact, speak before the board voted?

A. Yes.

Q. What did you say?

A. Well, not before James Blancarte called me out of the board room and explained to me that he had actually spoken to Gil Garcetti, and Gil Garcetti had told him that he was, in fact, aware of the case, and that he would become more personally involved in the case. In fact, that he would look at it again first thing in the morning, and that he would – the way Blancarte related to me was that he would give it his highest priority, and that I had nothing to worry about, and that I could go, and I didn't have to speak before the board.

Q. When Mr. Blancarte said "the case," "aware of the case," did you perceive that as being the People v.

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[190] October 3rd meeting, was recorded?

A. I don't know. I don't know how formal those meetings are.

Q. Did you see anybody taking notes or typing, like a court reporter?

A. There wasn't a court reporter there. I don't know. I'm assuming they have like a secretary and a treasurer, but I don't know who those people are.

Q. Going back quickly to your grievance, you requested Mr. Knoke to interview certain people that he apparently did not do?

A. Right.

Q. Judge Milton was one of them?

A. Correct.

Q. Why did you want him to interview Judge Milton?

A. Either before I filed my grievance or shortly thereafter, I called Judge Milton, and I asked him if he recalled the hearing in the case, and specifically if he recalled the way Defendant Najera treated me while I was on the witness stand, and he said he did, and he said he found her conduct to be very – I remember I wrote it down, and I actually gave that to George Knoke – that her conduct was very chastising, rude, and hostile towards me while I was in the witness stand.

Q. Did he indicate to you that her conduct in any

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[220] Q. How about Frank Sunstedt? How would you describe your relationship with him before this incident?

A. Good.

Q. Had you been intimidated – well, let me ask you, are you intimidated by him today?

A. I haven't seen him since September.

Q. Have you ever been intimidated by him?

A. Yeah, I think when I – that day after the meeting with the sheriff's department when I questioned his lack of ethics and what he was doing. You could say I was intimidated by the look he gave me.

Q. Any other instances of how you were intimidated by conduct or by anything that Mr. Sunstedt had said?

A. Well, beginning in June or July when he began his silent treatment, when he wouldn't talk to me. I do recall there was one occasion when I walked out of one office, and I think it was – I'm not sure if it was my office. I think somebody else's office, and he walked out of a kitchen, and we basically came face to face and probably within more than a foot of each other, and we just locked eyes and just stood there staring, or he was staring at me. I guess I was staring at him, and we just stood there not saying a word.

Q. That intimidated you?

A. Yeah.

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[249] Q. BY MS. LEE: Was it from a source other than your attorneys?

A. No.

Q. When did you become aware of that information?

A. In October of last year.

Q. How do you know that Mr. Sunstedt actually had knowledge of these allegations?

MR. BECERRA: Objection. Vague and ambiguous as to which allegations.

MS. LEE: The allegations that – the subsequent allegations made against these two deputies.

MR. BECERRA: Okay, so to the extent, again, that you're not asking anything that he got from his attorneys.

THE WITNESS: Well, the letter was addressed to Frank Sunstedt. It was mailed there to the Pomona branch, and then once I became aware of it and realized the case was still ongoing with – not the Cuskey defendants, but the other defendant, I faxed a copy of my memos to that defense attorney and advised him that there had been prior allegations involving the same deputies, and that pursuant to Brady, he needed to be aware of them.

Q. BY MS. LEE: What is this attorney's name?

A. His name is – it's not the attorney – not the [250] attorney – it's another attorney.

Q. Do you know the name of the criminal case of this attorney?

A. No, but I can find out. He's one of the local panel lawyers there in Pomona, and –

Q. It's just escaping you right now?

A. I can visualize his face right now.

Q. If you heard it again, you'd remember?

A. I would remember.

Q. So even though you weren't involved in the Cuskey matter, it wasn't your case, you thought it was still your obligation to hand over Brady material?

A. Well, I believed it was the obligation of the district attorney's office, in particular, the defendant, but it was clear that they were not going to abide by that obligation, so I took it upon myself, yes.

Q. Did you receive any type of response from the D.A.'s office to this action that you took?

A. Yes, I received a call from Director George Knoke who basically warned me that if I provided Brady discovery, such as my memo, to a defense attorney, that the police officers could sue me.

Q. Do you know what prompted this call from George Knoke?

A. He indicated that he had spoken to

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[262] A. I have no idea. I don't want to know.

Q. What about noneconomic damages that you're claiming?

A. Okay. Probably – not probably. You know, up until this incident happened, I had really enjoyed my job as a D.A. I knew going into law school I wanted to be a D.A. I think I even knew through college I wanted to be a D.A., and up until this incident, I enjoyed it. I enjoyed my job. Talking to other friends who I'd gone to law school with who are in civil practice – and no offense to you – they just would always complain about their job. They never – they didn't seem to like it, never enjoyed it, and I always had

the ability to tell them how fun my job was and how much I enjoyed it.

Yeah, there's days where you get tired of some of the stuff and wanted to get away from it, especially when I worked sex crimes. You just got tired of hearing about, you know, this station and that station, but overall, I enjoyed what I did. I felt I was doing the right thing. I felt I was doing a good thing. I felt I was doing a good thing putting the so-called bad guys away.

But I think that changed when this incident happened. Because up until then, I had always thought I had done the right thing. I had always thought that [263] everyone – all my superiors had done the right thing. I had never questioned the motives or ethics of anything I had done or anything my superiors had done, but this case kind of turned that, if you will, around, you know, and it made me really question being a D.A. It made me question whether I wanted to remain in the office.

There were times I really thought about quitting because of what they were doing to me. It just didn't seem worth it. It didn't seem to be the honorable thing to do because I felt – I remember the day of the motion leaving the office after testifying and just feeling like I was – that I was now like the defendants I had prosecuted, and I just was sick to my stomach. I couldn't eat. I couldn't – I had trouble sleeping, and I – it really got to the point where I really didn't want to go to work. I didn't want to deal with them. I didn't want to deal with this entire situation.

I just – I didn't feel right about what I was doing, and it made it more difficult to continue to handle other cases even though I knew this case was still around. Even though I didn't have it, even though it was no longer

assigned to me, I was still aware that this injustice was still happening, and I couldn't do anything about it.

And any time I tried to do something about it, I [264] had to face them, and I had to deal with them, and it just made me really think about what it meant to be a D.A.

Q. Well, let me try to break that down. I mean, what I'm trying to get at here is I assume this is your claim for emotional damages – you're making a claim for emotional damages?

A. I guess I am.

Q. Did you sustain some emotional damage as a result of the defendants' conduct?

A. Yes.

Q. You mentioned a few things. One was that you felt that you wanted to quit a couple of times?

A. Yes.

Q. When was the last time you wanted to – when was the last time you had that feeling?

A. Probably the day I was told by George Knoke that my motion was not – the motion – the grievance was denied – no. When he contacted me and basically warned me, "Don't provide Brady material to the defense because the police may sue you."

Q. Approximately when was that?

A. It would have been sometime in October, possibly November of last year.

Q. I'm talking specifically with regard to the [265] defendants in this case.

A. Uh-huh.

Q. When was the last time you felt you wanted to quit as a result of something that any of the defendants did in this case?

A. Well, when the grievance was denied.

Q. And that was on October 5th, 2000?

A. Right.

Q. That's when you were notified that the grievance was denied?

A. Correct.

Q. So that was the last time that you wanted to quit?

A. That's the – when I thought about it, yes.

Q. And up to that point, how many times have you wanted to quit?

A. I'm not sure I can even put a number on the number of times I thought about it. I mean, it was – you know, at times it was almost like a daily thought.

Q. What prevented you from quitting?

A. I don't know. Maybe hope that they would change, maybe the hope that there would be a change of administration, and that would affect it.

Q. There has been a change of administration, correct?

[266] A. Yes.

Q. Has that given you more hope, made you feel a little better about your job?

A. I think it did initially. I think there was a bit of a setback about two months ago, a month and a half ago. Actually even longer than that, in which I was set to go back to Pomona, and the head deputy there informed the deputy in charge of El Monte that he didn't think I should go back to Pomona because he didn't think law enforcement would approve of my going back.

Q. When was the change in administration?

A. I think he was sworn in December, first week of December. Actually, no, I want to take that back about when you asked me when I first – when I last thought of quitting.

I think when this recent event occurred with the head deputy, the new head deputy in Pomona, Richard Burns, where he told the deputy in charge that he didn't think I should go back and he told the other deputy in charge that I shouldn't file any cases involving Industry station and then he attempted to transfer me to Norwalk, I again thought about quitting. I was like, "This administration, it hasn't changed."

Q. Who did Richard Burns tell?

A. He told Terry White that he didn't think I

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[270] Huntington Park years ago.

Q. Any other damages that you're seeking?

A. You know, I would love to have my life the way it was before this all happened. I would love to have the

reputation I enjoyed with the D.A. before this all happened. My reputation has taken a hit. I mean, there are clearly D.A.s who won't talk to me anymore, won't deal with me.

Q. What is your understanding about the change in your reputation as a result of this incident?

A. There are people that obviously kind of whisper or talk about me behind my back concerning my motivation behind this.

Q. What do you mean "this"? Are you talking about the lawsuit?

A. The lawsuit, and even the grievance to a certain extent, but primary the lawsuit.

Q. What have you heard?

A. That I did it for Cooley's benefit, that I was somehow an instrument of Steve Cooley, and that I was doing all this simply in order to benefit Cooley's chance for election.

Q. Who have you heard make these statements?

A. Frank Sunstedt.

Q. Anybody else?

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[273] obviously they're entitled to know what you're contending caused you damages, so you mentioned some things now, and so think about it, if you need to.

I'll throw something out there to jog your memory. Have you sought treatment as a result of any emotional distress that you've suffered?

A. No.

Q. Have you taken any medication?

A. No. Maybe I may have taken some sleeping pills, you know, over-the-counter sleeping pills.

Q. How long would you say the emotional distress lasted?

A. The nine months that this went on, from March through – well, through the grievance and filing of the lawsuit.

Q. Is this something that's continuing?

A. No. It tapered off, or it's stopped with the election. It started up again when Rich Burns made those statements to Terry White and Michelle Daniels, but after I spoke to John Allen, it stopped again.

Q. But is it your belief and understanding that either Garcetti, Sunstedt, or Najera had anything to do with the comments being made by Richard Burns about your transfer?

A. I don't know. I mean, it's clear that his

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[275] told me, basically kept coming to my defense, basically telling Defendant Najera, "No, he's a good prosecutor. He knows what he's doing," and Carol Najera basically kept criticizing my abilities.

Q. When was this?

A. This would have been before I filed my grievance, but exactly when, I don't remember.

Q. And Grosbard related this to you?

A. He related it to me, and he also wrote it out in letter form which was attached to my grievance.

Q. Do you believe that your abilities as a prosecutor has diminished in any way as a result of any conduct by the defendants?

A. My abilities?

Q. In other words, did anything that the defendants do cause strain or, you know, any strain to your prosec[u]torial abilities?

A. You know, I'm sure it got to the point where I simply stopped caring about what I was doing, and you know, it was never really a job before this, but it almost became a job after it. It was just something to go to just to make money, and I wasn't enjoying it any longer.

Q. And that was up to the point in time when you got transferred out of the El Monte office to Downtown, [276] or is that something you're still experiencing now?

A. No, no. I'm not experiencing it now.

Q. That was up until the time that you were transferred out of the El Monte office to Downtown?

A. Right.

Q. I'm talking specifically about do you believe that your abilities to perform your prosec[u]torial duties, your

abilities to be an effective prosecutor, to perform your obligation to the D.A.'s office, were diminished in any way as a result of the conduct of the defendants?

A. I think in order to really do the job properly, you have to kind of care about what you do, and I think because of what they did to me, I stopped caring about what I did, and I do think that has an impact on how we do our job.

Q. Can you think of any cases where you lost a motion, or you didn't handle something in the best way that you could attribute to this incident?

A. No, nothing comes to mind.

Q. Have you been reprimanded or verbally advised that something that you did was less than the standard required of the D.A.'s office?

A. No.

Q. The last thing I wanted to do was show you a document. It was provided to me by your counsel at the

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNDSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	) No. CV 00-11106) (AHM) (AJWx)

DEPOSITION OF FRANK SUNDSTEDT, taken on behalf of the Plaintiff, at 3500 West Beverly Boulevard, Montebello, California, commencing at 10:22 a.m., on Wednesday, September 5, 2001, pursuant to Notice, before TERI E. GONTA, CSR NO. 10099, a Certified Shorthand Reporter in and for the County of Los Angeles, State of California.

* * *

[29] Q. Okay.

A. Up until that time, sure.

Q. Okay. Then we're talking pre Cuskey?

A. Yes.

Q. Okay. We'll get to Cuskey in a little bit.

A. Sure.

Q. Okay. At some point before Cuskey, do you have a recollection that Mr. Ceballos is actually made – and I'm not sure of the exact title – but actually a deputy in charge of the courtroom?

A. Yes.

Q. And what's the correct title?

A. Calendar deputy. I made him a calendar deputy.

Q. Okay. Now, what was the reason that you made him a calendar deputy?

A. There were – well, there were a couple of reasons. Richard was a Grade III. I didn't – a calendar deputy position is a position where a deputy D.A. is assigned to a direct calendar court, and there are two other deputies. If your staffing is – if you have the staffing, two other deputies assigned to that court to work under the calendar deputy. The calendar deputy is responsible for the processing of all criminal cases that are not specially assigned to [30] special unit people that are assigned to that calendar court. And so a calendar deputy's duties are to make sure that the cases are handled appropriately in that department. And I can't even remember now what your question was.

Q. Well, actually you saved me a couple questions. I was going to ask you what a calendar deputy was. You already answered that. I appreciate that. It sounds like that's a promotion.

A. Well, it certainly isn't any more pay. It is a – in the culture of the D.A.'s office, deputies that are trial deputies frequently want to be calendar deputies because they want it on their resumes for promotional purposes. And you have an opportunity to then supervise at a much, you know, lower level, but still assign lawsuits. And you have a lot of interaction with the head deputy as a calendar deputy so –

Q. And is a calendar deputy – is he allowed to select which cases he will try as distinguished from the people that he supervises?

A. You have – yes, as a calendar deputy, you have much more latitude in culling out, if you will, cases that you want to try and assigning other cases to other lawyers, yes.

[31] Q. Okay. And did you tell me why you selected him to be a calendar deputy?

A. Well, at the time I selected Richard to be a calendar deputy, I didn't have – I didn't have enough Grade IV's to supply a Grade IV calendar deputy to the four criminal departments. And point in fact, I only had, I believe, two Grade IV's and a number of Grade III positions, so that I would, as best I could, rotate assignments within my branch so that I could give everybody an opportunity to do calendar work. I would give everybody – although they didn't consider it an opportunity – a staffing assignment to file cases. So you – downtown would not help you with your staffing level. You got a staff, and you were told to manage your operation as best you see fit.

I recall discussing with Mr. Ceballos as calendar deputy at the time that I was considering putting him in

charge of the calendar, and I asked that calendar deputy whether he thought Richard was up to the task. He told me that he thought he was. I had not seen any evidence that he wasn't, and so I selected him as a calendar deputy.

Q. Okay. Was his performance as a trial deputy, was that part of what you took into

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[35] had some – you felt good about him as a deputy being in your office and working with you?

A. Yes.

Q. All right. You did evaluations – let me back up.

As part of your responsibilities, did you have to do employee evaluations of the deputies that were working with you at Pomona?

A. Correct.

Q. All right. And would you do that, be solely responsible for that, or would your assistant, Ms. Najera, also participate in those evaluations?

A. I believe I did them all for Grade III's, and Grade IV's, and I did ask Carol and her predecessor, I believe, to do the performance evaluations on the newer deputies. But I believe I did all of the performance evaluations for the Grade III and Grade IV deputy D.A.s.

Q. Okay. And when an evaluation is done of a deputy district attorney – and let's stick to a Grade III at this point – what is evaluated? What's the criterion in doing an evaluation?

A. Well, it's probably the – it's probably the least favorite job of a supervisor in the D.A.s office because they are the – you have to do

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[43] A. I do.

Q. Okay. And how is that scored?

Is that a number score, or is that a letter score?

A. I believe it was a letter score.

Q. Okay. And do you know what you gave him?

A. I believe I gave him either – and I think I rate him in seven or eight categories. I think I either gave him all A's or almost all A's and a B or something, but I certainly rated him so that he would be in the outstanding category.

Q. Okay. And your intent would have been that he be seriously considered for promotion to a Grade IV?

A. Well, I guess you would have to – well, to answer your question, yes, I think he was definitely a candidate. Amongst the whole there was going to be, you know, any number of – maybe as many as 150 candidates for the Grade IV position, and I think I rated – when I rated Mr. Ceballos, I think I rated eight other – seven or eight other candidates, including Mr. Ceballos.

Q. And those seven or eight other candidates also would have been deputies that you would have been supervising at the Pomona branch?

[44] A. Correct.

Q. Okay. And would you have rated the other seven or eight as highly as you rated Mr. Ceballos?

A. I did, except for one.

Q. All right. Do you know if any of the others were actually promoted to Grade IV?

A. Yes.

Q. Out of the – if we're talking about seven or eight, are we including Mr. Ceballos, or are we really talking about eight or nine?

A. You know, it – if you can give me just a minute, I'll try and reconstruct the candidates as I recall them, and I can maybe give you the exact number.

Q. Sure.

(Recess.)

MR. BECERRA: Back on the record.

BY MR. BECERRA:

Q. I think you were going to try to reconstruct as to how many people that you had done the AP on were, in fact, promoted to Grade IV.

A. All right. I have reconstructed a list, which I believe is complete, of ten people, including Mr. Ceballos.

Q. And how many of those were actually promoted [45] to Grade IV?

I have a list and I can't represent to you it's totally accurate. If this would refresh your memory, if you want to look at the list, I don't have any problem with that.

MS. LEE: Maybe it might save some time.

BY MR. BECERRA:

Q. See if it helps at all.

A. Fernando, Manny, Don Clem and Cathy Kady, four.

Q. Okay. Four out of ten?

A. Yes.

Q. And can you mention their names again. Just tell me what their names were again real quick.

A. Fernando Guzman; Manuel or Manny Garcia; Don Clem, C-l-e-m; and Cathy, with a C, and Kady, with a K, K-a-d-y.

Q. Okay. And –

MS. LEE: Is that assuming that list is correct or is that –

MR. BECERRA: That's just assuming for the purposes of the question that the list is correct, and it looks like a copy of General Office Memorandum 00-74. So I assume we can get an original.

[46] THE WITNESS: I don't have any dispute with the list.

BY MR. BECERRA:

Q. Okay. These four that you mentioned – and you don't have to be off the top of your head – but in your own head, can you see why they would be promoted as distinguished from Mr. Ceballos based on what you know?

And I'm not saying that you know everything that downtown or headquarters knows, but just based on what you know.

A. Well, as to those four candidates, they all got rated the same by me, and frankly, of the – let's see, one, two, three, four, five, six, seven, eight of the candidates of my list of ten, I all rated outstanding. And those eight deputies would include Mr. Ceballos. Two of the deputies I rated less than outstanding.

Q. And those two were actually promoted?

A. No. Oh, heavens, no.

Q. Okay.

A. Heavens, no.

Q. But in terms of – in your own mind when you look at the ones that were promoted, if you can draw a distinction between them and Mr. Ceballos, does [47] anything stand out in your mind?

MS. LEE: Of the four you indicated were promoted.

THE WITNESS: I would have to think that the reason Cathy Kady got promoted was because of her trial numbers. She had a very large amount of trial work. Cathy had – was extremely experienced and tried a number of high profile cases for the office. So I would have to believe that that was more than responsible for why she got promoted.

BY MR. BECERRA:

Q. Okay. So that one stands out in your mind. Any of the other three?

A. Well, Fernando always had a lot of trials, jury trials. Don Clem had a lot of jury trials, and so – I mean, if you're – and so I rated them all outstanding. They all had significantly more jury trials than Mr. Ceballos, significantly more, maybe as many as 20 or 30 more juries. And so, you know – but you're asking me, you know, and I didn't make the promotions that Los Angeles did. And the only – and I can't tell you why Manny got promoted, Manny Garcia over Richard. I kind of looked at them as kind of in the same category.

Q. Okay. In terms of – okay. We talked a

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[49] examination and the score on your appraisal or promotability. And I believe they were weighed 50 percent each, I believe.

Q. All right. Now, when – okay. I take it the eligibility list goes up to, we can call it downtown or headquarters, or whatever we want to call it.

A. Yes.

Q. Okay. Is there any further communication in connection with Mr. Ceballos as promotability between yourself and downtown?

A. I think that the director asked me to give him my top three or four candidates of my list of eight candidates, bearing in mind – I mean, I don't know how many promotions they made. You could add them up.

Q. I could count them.

A. I was only one branch. I was one branch in Pomona. I mean, there's ten branches at the office. There's hard-core gangs. There's any number of special units that had candidates. And there's central operations that has candidates. So I mean, the likelihood that any one branch was going to – I was surprised I got four because it's just a numbers deal. And so I believe the director asked me to give [50] him my top three or four candidates.

Q. Okay. Do you remember who you selected?

A. Yeah, I do. Cathy Kady was number one.

Q. Okay.

A. Randy Harris was number two.

Q. Okay. And he actually was not promoted; right?

A. He was not promoted.

Q. All right. And number three?

A. I think it was either Fernando or Don Clem. I mean, they were – and they could have been close because they both had almost the identical jury trials.

Q. Okay.

A. Don had been a calendar deputy. Fernando was doing a special assignment for me in West Covina, working with Judge Lopez and Krissy Weiss.

Q. Okay. Would this communication be like a phone call to you saying, "Look, we've got your list, and I need you, you know, because we only have so much room, I need you to tell me which ones are your top"?

A. That would be exactly the way it would be done, just a telephone call. "I'm going in a meeting. Just give me a thumbnail sketch of who you [51] would think would be your top three or four candidates out of eight."

Q. Okay. And then would it be, "Who are they and why," or would it just be, "Who are they?"

A. Just, "Who are they?" I mean, everybody at this time, theoretically, should know the candidates from downtown, and so I – obviously, my recommendations were followed halfways, and my other recommendations weren't followed. So frankly, I don't know what they did.

Q. Okay.

MS. LEE: Why don't we – so that there's no confusion, I counted the number of promotions – district attorney for promotions, and there is 44; 22 in each column. Why don't we just go ahead and attach this as an exhibit.

MR. BECERRA: I think that's a good idea. And just for the record, I think I put a little mark by the names he mentioned, and that was, like, a little circle. I did that.

MS. LEE: The circle of the candidates that were promoted from Mr. Sundst[e]dt's unit.

MR. BECERRA: Okay.

MS. LEE: Okay.

MR. BECERRA: And I think if we could, I'll [52] have Humberto go to my office and find out the next number and just keep them in sequence, whatever the next number exhibit is, so that way we have it sequentially.

MS. LEE: Oh, from Mr. Ceballos' depo?

MR. BECERRA: Yeah.

MS. LEE: That's fine.

MR. BECERRA: It's just sitting on my desk.

(Interruption in the proceedings.)

MR. BECERRA: Back on the record.

BY MR. BECERRA:

Q. Okay. The request for the – you know, your top folks, do you know if that was pre or post Cuskey? Cuskey would be, I think you would be aware of it, and if we can use the date of March of 2000.

A. Well, I think it would be after the Cuskey case, for sure.

Q. Okay. Did you?

A. I think my – yeah, it would have to be. I don't know when – when did they make promotions effective, August 25?

Q. Yeah.

A. I'm sure it was August sometime.

Q. All right. Shortly before the results were actually announced?

[53] A. Yeah.

Q. All right. In coming up with the top three or four folks, did you consult with Ms. Najera at all on that?

A. No, I did not.

Q. Okay. And in terms of thinking about the top three or four, did you consider Cuskey at all in terms of what had occurred between Mr. Ceballos and the handling of that particular case?

A. No, sir.

Q. Okay. Let's go over to March of 2000. Okay. And I'm using – and I believe we have a memo on that day. Okay. And we don't have to do that, but let me see if this refreshes your memory.

When do you first become aware that Mr. Ceballos has some question as to the police conduct of the handling of the Cuskey matter?

A. I can't tell you the month, but he brought it to my attention, and I believe he brought it to my attention via memo.

Q. Okay. And would that have been the procedure that he should have followed?

A. Yes.

Q. Okay. So best as you can recall, what was it that he was bringing to your attention?

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[56] A. Honestly, I've –

MS. LEE: Calls for speculation.

THE WITNESS: Honestly, I've never heard that one way or the other. I don't think I've ever been privy to any conversation where anybody remarked about Mr. Ceballos' toughness or lack thereof.

BY MR. BECERRA:

Q. All right. So when you received this memorandum questioning the veracity or the honesty of the officers' statements within the declaration, what did you do?

A. I was extremely concerned about it.

Q. Okay.

A. I think the – I did two things. Mr. Ceballos had written a memo where he had – where he had, himself, made conclusions that he had concluded on his own that the police officers had, A, committed perjury, or I mean – but he, Mr. Ceballos' memo was as if he had – was a judge or a jury having listened to both sides of the evidence and concluded that A is correct.

And when I read the memo, I said, "Richard, how can you make these conclusions? I mean, you've – the police have submitted the search warrant. You've made some observations, and based [57] upon your observations, you have concluded on your own, beyond a reasonable doubt, that the officers are guilty of felonies."

And so when you asked me what I did, I said, because we – "We're not there. We didn't go there. You feel that there's an inference that the officers may have committed a crime, but the way you've written your memo is, you've concluded it on your own that they've committed a crime." So I asked him to modify his memo to remove his legal conclusions and phrase them – I mean, his memo is the same, you know, his observations, but put it in a – what the inferences are rather than for Judge Savales, if you will, to have concluded on his own that the police officers had committed a felony.

So that was, I believe, the first thing I did, and he modified the memo and I – and the – and then I called the appropriate supervisor over who the deputy was – or the deputy sheriff that Mr. Ceballos had a suspicion of, or deputies. I think there were two or three of them involved. And I told the captain there that I thought we had a problem with this case, and that I thought we ought to have a meeting to discuss it.

Q. Okay. After receiving the memo, would you

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[63] the sheriff's department?

A. I believe it was within a matter of days from the time I notified the captain until the meeting occurred.

Q. Now, I know it's been a while. I just want to make sure I understand this.

Any request – well, would it be directions or requests to change the memorandum that contained the conclusions of Mr. Ceballos, would that have come from you or Ms. Najera?

A. That came from me.

Q. All right. And would you – how would you characterize it, as an order or as a request?

A. Well, I – speaking as Richard's supervisor, I didn't order him to do it. I mean, if Richard would have said to me, "This is the way I feel. I'm not going to alter it," I would not have changed what I was going to do, but – and I still would have had a meeting, but, you know, I had been in the office a long, long time. I've been a lawyer dealing with fact patterns a long, long time. You have

obviously run into situations where you believed one thing was so, and you found out you – that you were mistaken, and, in fact, it was proven that something else occurred, which made you – not that you were lying [64] about it, but you were just flat-out wrong in what you had concluded.

And so I recommended, as Mr. Ceballos's supervisor, that he not alter anything about what his observations were, that as his supervisor, that he shouldn't posture and make his own legal conclusions because he is a deputy D.A. entitled to his conclusions, but he was going to be a career prosecutor for a long time. And if he was proven to be inaccurate, then he had already convicted somebody when, in point of fact, he was inappropriate or wrong in his conclusion.

So what I was doing was a suggestion as a supervisor to a trial deputy to say to do exactly what you're going to do but eliminate the fact that you have already postured and said this is – and again, as I suggested earlier in an answer, "Richard, don't act like you're the judge and the jury." So all I asked him to do – and it was a request. I wasn't – I didn't order him to alter his memo. I would have if Richard would have sent that or wanted that memo to go, that memo would have went, and that's what we would have done.

Q. Okay. Would this have been after – if you remember, would this have been after the initial [65] meeting that you had with Mr. Ceballos?

A. I don't remember.

Q. Okay. The meeting does in fact occur and you're present?

A. Correct.

Q. Ms. Najera's present?

A. Correct.

Q. Mr. Ceballos?

A. Correct.

Q. And who from the law enforcement agencies were present?

A. There was a lieutenant and a captain and a sergeant, whose name escapes me, who wrote the affidavit, whatever his name was. I think it was Captain Binkley, Lieutena Barstow and whoever the detective's name is.

Q. Does Keith Walls ring a bell?

A. Yes, that's his name.

Q. And was Deputy D.A. Galan also present?

A. Yes.

Q. Did you know who requested he be there?

A. I do not.

Q. And was it your understanding that Galan had actually handled the Cuskey case before Mr. Ceballos had assumed responsibility for it?

[66] A. I'm not aware of that. I know that Mr. Galan went out when Mr. Ceballos viewed the scene. My – but I didn't – I'm not aware, as we sit here, that he was involved in the case at all.

Q. Now, the meeting itself, was that actually requested by the law enforcement folks, or was that something that you initiated?

A. I requested the meeting.

Q. And the purpose of the meeting was?

A. I wanted to – well, since I sent the memo and I called, I wanted to have a meeting to see if the sheriffs had anything to respond to the memo in the meeting. And you know, if you want to call it due process, that's what I was – I mean, we are the prosecutors. We are the lawyers on the case, but that's not to suggest that the sheriffs are not a stakeholder in that particular lawsuit. And so out of fairness, if the case was going to get dismissed, I was going to dismiss it whether I had a meeting or not. But in terms of how I had conducted myself as a manager over, you know, two decades, that's what I did.

Q. Okay. And did anything occur at the meeting that changed your – well, let me ask this.

Did you have an opinion, speaking to

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[68] Q. All right. Okay. Does something occur at the meeting that changes your mind with regards to dismissing or not dismissing?

A. Well, it always – I suppose that as much as the fact that I truly believe that Richard had blinders on and he had postured, if you will, to the exclusion of any other rational explanation as to how the affidavit was prepared, I – after listening to the sheriff who prepared the affidavit and not really listening to the captain as much, or the lieutenant, I wasn't as sure that a dismissal without an

airing of the evidence was the appropriate way to handle a case.

Q. Was there anything that stands out in your mind as to what tilted you towards that?

A. No, not as I sit here, no.

Q. Okay. Now, you mention that it appeared to you that Richard had blinders on?

A. No. Well –

Q. You used that, I think, as an analogy.

A. Richard certainly postured that there was – in his mind, there was no other conclusion, no other conclusion but that three officers, I believe, had feloniously participated in processing a prosecution against these fellows, or fellow. And I think that

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[70] Q. Okay.

A. That certainly would have been an option down the road.

Q. Okay. And that's an option that you wouldn't have considered at that time because of what?

A. Well, being a head deputy, in my estimation also means knowing that you don't know everything. I mean, it's not just being the supervisor and acting presymptom all-knowing.

After the meeting occurred, I was not convinced like Richard was convinced. I just wasn't. I just wasn't. And

since the case was in court and a motion, and I believe, a 1538.5 had already been set, I – again, I'm doing it from recollection. I believed that – that before SID would ever get involved in this case, that I determined that I wanted to hear those guys testify under oath. And I don't mean I wanted to hear it personally. I wanted a black robe to hear it. And based upon that and whatever the judge ruled, if the judge would have suppressed the case and made findings against the credibility of the police officers, I certainly would have involved SID at that point in time.

Q. You knew that there was some hearings in

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[74] 1538.5 is an unusual occurrence. And so I had no expectation, other than Judge Milton would listen to the evidence and do what he felt was best on the case.

Q. Did – after the meeting, did Mr. Ceballos continue to request to have authority to dismiss the case, the Cuskey case?

A. No.

Q. Did he make any accusations as to you specifically kowtowing?

A. No.

MS. LEE: I don't know what it means.

MR. BECERRA: Okay. We're going to find out.

BY MR. BECERRA:

Q. Did Mr. Ceballos suggest to you that you were kowtowing to the wishes of the police department, actually

the sheriff's department, in not dismissing the Cuskey case?

A. No.

Q. Did he criticize you in any way for not dismissing the Cuskey matter?

A. To my face?

Q. Yes.

A. No.

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[80] Q. To your knowledge, was Ms. Najera's husband ever arrested for shoplifting, to your knowledge?

MS. LEE: Objection. It's not relevant but –

THE WITNESS: I don't know.

BY MR. BECERRA:

Q. Okay. So – okay. So therefore, if you don't know, you wouldn't have had anything to do with the prosecution or dismissal or disposition of that?

A. Correct.

Q. All right. Okay. Did you ever speak with Mr. Garcetti about the Cuskey case and the allegations that Mr. Ceballos was making?

A. No.

Q. All right. Did you ever speak to Mr. Garcetti about any employee decisions – I'm sorry – any employee actions that were taken on your part to Mr. Garcetti?

A. No.

Q. And I know I'm ahead of the game here, but did you ever discuss with Ms. Najera reassigning the employment duties of Mr. Ceballos?

Was that something you discussed with her before any of the actions were taken?

A. Before any of what actions?

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[93] Mr. Ceballos?

A. I don't remember. I mean, you know, I got to tell you – and obviously, this has found its way into a lawsuit. My – this was a case I felt that a certain situation arose which caused me to handle this case a little differently, but it was a case, and I didn't – I didn't – I did not drop everything else that was on my radar screen or on my plate, hundreds and hundreds of cases, 28 deputies in Pomona, another 25 to 30 deputies in the outlying courts.

It was – I'm saying it wasn't a big deal to Mr. Ceballos because – obviously, it was, but this was Mr. Becerra. This was just a case to me, so I don't have any, you know, real recollection as of what happened afterwards standing out because the judge made a call. And as far as I'm concerned, it was over.

Q. Okay. So the – I don't want to call it switching, making Mr. Ceballos a co-calender deputy your purpose in doing that was what?

A. All right. I'm painfully aware because I have read the complaint, and I've read the grievance that Mr.

Ceballos accused me of demoting him from a calendar deputy position to a trial deputy position.

[94] I have to tell you that – and I've refrained from making any personal commentary – that is flat-out untrue. Mr. Ceballos knows. The superior court knows that. In April of 2000 the superior court, and it was – was it consolidated then? I don't think it was. Superior court in Pomona changed its method of operating its criminal business. It went from four direct calendar courts to two master calendar courts. When it was four direct calendar courts, Mr. Ceballos had one of the four direct calendar courts. Don Clem had one of the four direct calendar courts. Both of those deputies were Grade III deputies. The other calendar courts were staffed by Grade IV deputy D.A.s, Michael Grossbard and Debra Pathow.

When the superior presiding judge of Pomona announced that the court was changing the way it does business, and it's collapsing the four direct calendar courts into two master calendar courts, I had two Grade IV deputies that were doing calendar work. I was not going to take two Grade IV deputies and make them less than calender deputies and make Grade III deputies the calender deputies.

And so by operation of the way the building changed its criminal business, Mr. Ceballos became a [95] a co-calendar deputy with Mr. Grossbard in the – and I believe it was Department N in Pomona. Mr. Grossbard – I mean, Mr. Ceballos was never demoted. It has – it has as much relationship to Cuskey as a raccoon out in the forest has to – it's just – and I can't tell you that it is the most disingenuous, if not dishonest, allegation of the

things that I've read, and you can – and this is just a matter of record.

And I made pains to tell the deputies ahead of time. I even had a big meeting to explain to them at a location, whose name escapes me, and I told the deputies how the building was going to change. It did change. I told the deputies that I wanted co-calendar deputies in each court because I wanted the co-calender deputies to run that court and create and establish their own vacation schedules to ensure that both co-calendar deputies would not be gone at the same time, and that was up to them. And Mr. Ceballos was one of those calendar deputies assigned with Mr. Grossbard to Department N and that if that is retaliation in some fashion for Mr. Cuskey, I don't know where that comes from.

Q. Well, let me ask you this.

Do you feel that your relationship changed [96] at all following the Cuskey hearing with Mr. Ceballos?

And let's talk about before you get the grievance, and let's talk about before the lawsuit.

A. I don't think my relationship with Mr. Ceballos changed. I think perhaps his relationship with me changed.

Q. And what makes you say that?

A. Well, he avoided me. I mean – and I can't establish a date because, you know, he was one of – only one lawyer in a staff of – I had 50 people, including secretaries, paralegals, lawyers. I mean, at least he was two percent of my staff that – it became clear to me that the cases that were assigned to him would be brought into my office by

other deputy D.A.s rather than him coming to my office because I had an in-box and an out-box and routinely the deputies, when a case was concluded, would come into my office and drop off the files before the Cuskey case, and I don't know, maybe even after.

It became clear to me that at some point in time Mr. Ceballos stopped coming in to drop off cases in my office, although I could see on the file that they were cases handled by him. Other deputy D.A.s that officed with him would bring me in the files, so [97] I did not change my relationship with Mr. Ceballos.

Q. I think you mentioned that you had reviewed the grievance and the complaint.

A. Yes, sir.

Q. Are you aware that he has indicated that a case called *People versus Perrin*, P-e-r-r-i-n, was taken from him, again in retaliation, and given to a Grade II deputy after the meeting with the sheriff's department?

A. Well, I'm aware that that case was given to a Grade II deputy, and I'm aware that it happened after the Cuskey episode, and if you would like me to –

Q. Yeah, I was just going to ask you –

A. – address that, I certainly would be happy, though.

Q. Do you know why that case was reassigned to a Grade II?

A. Yes.

Q. And what was that?

A. The case was given to Steve Galan. Steve was – had been assigned to me for, I guess, about a year, maybe a little over a year. He was an extremely promising Grade II, and he had tried, I think, about three dozen jury trials for me, got, I [98] believe, excellent results.

You know, as county deputies go, everybody wants, at some point in time, to try homicide cases. That's the nature of trial work. You don't want to continue to do trial burglaries and robberies. You want to try a death case. I made sure that before he got transferred – because he was on a track to go to juvenile for six to nine months where they don't do jury work, and I wanted him to try a homicide case before he left for juvenile.

I selected the Perrin case because it was a case that was, in the parlance, not a very good case. It was a homicide case where the theory of the People was reckless discharge of a gun resulting in a murder. And as you know, because you've been in the business a long time, the scenario was that these people that were dealing dope were afraid that some other contingent was going to come over and have a fight with them because they were taking away their dope business. So the medullae (sic) is dopers attacking dopers. Our defendant rushed over to this house and was waving a gun around and discharged a bullet, and the bullet hit a gal in the back, one bullet, and killed her. And we filed homicide based upon an abandoned and malignant hard reckless [99] discharge theory.

I mean, you know what that case is worth? I tried to dispo that case for a voluntary manslaughter for 21 years, knowing full well that I didn't have an intent to kill, but thinking that, yot know, if a guy goes even on a second-degree murder with a gun, when I think was a 25-to-life

gun, so he's looking at 40 to life if he falls on murder with the use. So I offered 21 years. Everybody knew I offered 21 years.

And point of fact, I did all of this while Mr. Ceballos was still the deputy assigned to the case. The case was – so I selected this case for Mr. Galan for two reasons. When you're mentoring, you don't want to give a kid a good case and have him lose it and lose all of his confidence. He knew up front that I had very little expectation that we would sustain our burden to establish a murder conviction, which we didn't. I think the defendant was ultimately convicted of involuntary manslaughter with a gun and got a 14- or 15-year sentence, which everybody that knows the business, including Mr. Ceballos, knew was the most likely and probable event after a jury trial.

And that's the case that I gave to [100] Mr. Galan so that he could try his first homicide case, not feel too bad if he didn't get the desired result of murder and yet say that he had the experience of trying a homicide case. I did not remove the case from Mr. Ceballos for any sinister reason at all because my job was not to be the deputy supervisor for Ceballos. It was to be the deputy supervisor for everybody in my office, including the experience based for the Grade II's that deserved it.

Q. To your knowledge, are the number of 187 cases handled successfully by a deputy in your office, is that something that's considered in terms of promotion?

Maybe the better word would be promotability.

A. Sometimes. Sometimes. Because, you know, you're – when this office changed over time to become so segmented where you had deputies in appellate division

who never get a chance to try a murder, and their head deputy would always be complaining to their directors, say, it's not fair to a guy that works for me that never gets a chance to try a murder. Why don't you measure my lawyer about what his value is to my unit versus just looking at hard-core gang, and all they do is try murders. So [101] obviously, they are going to look better than my lawyer who is arguing before the court of appeal.

And so at some point in time within the last decade, the office, I think, truly recognized that certain deputies should be promoted, even though they are not trying the sexy cases, the murder cases. And so everybody in the office would always tell you that they thought that hard-core gangs – there was a bias in favor of hard-core gangs because all they did was try murders. And maybe there was some merit to that, but I think you would find now that a person in the appellate division, a fraud division, sex crimes division, would now have a better crack at bat, so that it's not necessarily true that you had to be trying homicides to get promoted.

Q. So would you have been the one to personally have made the decision to transfer *People versus Perrin* to the other deputy?

A. I believe I did.

Q. Okay. And would you have discussed the way you just did with me now the basis for doing that with Mr. Ceballos?

A. I – I – yes. I never made any decision without discussing the why of it. I just didn't do it. It's just not my style.

[102] Q. Do you have any recollection of what Mr. Ceballos's reaction was when you indicated to him you were going to be transferring this to a Grade II, this particular case?

A. I don't recall.

Q. Do you actually recall a meeting with him, though?

A. I do believe, Mr. Becerra, as I sit here, no. But all I'm telling you is, is that that's what I normally did. I wasn't – I didn't sneak around and do things behind people's back. I just – that just I had a reason for doing what I did. And I normally articulated the reason to the people affected by the decision.

Q. All right. At some point do you make a decision that Mr. Ceballos is going to be transferred to – I think technically it's called the Rio Hondo Judicial District as distinguished from being in the east district of Pomona?

A. Well, I made a decision that Mr. Ceballos was going to take a tour of duty, filing, filing cases. And that – I don't know whether we touched upon it earlier, but of all the jobs in the D.A.'s office, filing cases is probably the least glamourous because all you're doing is saying "hi" to the cops, [103] reading police reports and filling out a yellow sheet and filling out statement of facts. It's not very glamourous if you are trained to be in a courtroom.

I had notified Mr. Ceballos – I had notified, frankly, everybody that worked for me that I had a situation where I had – I was responsible for staffing filing deputies in Rio Hondo, El Monte. I was responsible for staffing filing deputies in Citrus, and I was responsible for filing staffing in Pomona. So I had two filing spots in Rio Hondo, two

filing spots in Citrus and two filing spots in Pomona. I needed at any given point in time six filing deputies to run my operation. I had one filing deputy, his name is Randy Harris, who enjoyed filing and wanted to stay filing. Of the other five positions, I didn't get volunteers, so I had to tell everybody on my staff that they would have to share the pain, so to speak, and that I would rotate filing responsibilities amongst all the Grade III's and maybe even some of the Grade IV deputies.

Mr. Ceballos knew this because I mentioned it at my daily calender deputy meetings for probably a year before Cuskey happened. I had – and I'm just looking at this list of the ten people that were sitting for that promotion. I told Don Clem that he [104] would have to at some point file. Eugene Hanks, I'm sure you know, I made a filing deputy. Ed Miller, who is the same grade, Grade III, as Mr. Ceballos, sat out in Rio Hondo, and I thought he liked it, and that's why I didn't move him. And then all the sudden he called me one day and said, "Frank, you know the Grade IV examination is coming up, and I'm not going to look as good as the other candidates because I've been out here filing. Could you move me to Pomona so I can get some more trials before I sit for the promotional test?"

I said he had – "I would have moved you a long time ago, but I thought you liked it, and you didn't complain." So it took a decision off of my neck. As soon as he told me he wanted to try cases, I moved him.

Manny Garcia – as a matter of fact, I told Manny Garcia that he was going to go file a week after he got promoted to Grade IV. I think, as it turns out, we had some other changes, and it didn't come to pass. Fernando not only did filing for me – Fernando Guzman not only did

filing for me, but he was willing to leave Pomona court where he lived and go to Citrus, not a great deal drive difference, and work with Judge Lopez.

[105] And the early disposition court that really helped the whole building because it got rid of cases prior to prelim stage, and from then, total team player, total, said, "Whatever you need." Cathy Kady who was probably number one on the promotional list, on everybody's list, was the filing deputy in Pomona for me for one year, and Richard Ceballos was supposed to replace her. He was supposed to replace her and would have replaced her in Pomona so he wouldn't have never had to go to Rio Hondo. He knew it. The building knew it. I moved Cathy Kady up with Grossbard to be co-calendar deputy because she had never been a calendar deputy, so I made the move. And so Richard Ceballos was supposed to take Cathy Kady's place, filing in Pomona.

As it turns out, I had another Grade III female deputy who turned out pregnant whose doctor ordered her out of court. And so she had to be at a desk job off her feet and so – Nancy Dukellis is her name. D-u-k-e, double l, i-s. She, unfortunately, took the filing spot that Mr. Ceballos would have taken, but she got pregnant and there's nothing I can do about that.

Keith Thompson, Grade III, was a filing deputy. He was a trial deputy in Pomona. And I put [106] him in Citrus to do his filing responsibilities. And Randy Harris, of course, was the deputy that enjoyed filing and stayed there.

So the fact that Mr. Ceballos got transferred to be a filing deputy is because he was treated identically with

every other Grade III that I had on staff there, and everybody in the – in my office knew it.

Q. Mr. Ceballos will eventually file a grievance against you?

A. Yes.

Q. Before I get to his grievance, did Mr. Grossbard file a grievance against you for these transfers?

A. No.

Q. Okay. He never filed a grievance against you?

A. No.

Q. Did any of the deputies that were transferred to those positions file a grievance?

A. No.

Q. All right. Now, Mr. Ceballos, does file a grievance against you.

A. Yes.

Q. All right. And the procedure is such that

* * *

[110] she was – she was being grieved along with me. We were co – whatever you want to call us.

Q. Yes. I'm not sure what the right term is either.

MS. LEE: Co-retaliators.

BY MR. BECERRA:

Q. All right. And would this have been after you got the grievance, or would this be at the time Mr. Kinoke is going to come out and do the interview?

A. After the grievance, before Kinoke came out.

Q. Okay. And would this have been something, like, informal, where you just call up and say, "Hey, I would like to chat with you, appears there's been a grievance filed against us"?

A. No, it was probably like, "What kind of crap is this?" It was – you know, but I mean, it was not formal. I mean, it was, you know just –

Q. Do you remember anything she said about the grievance?

A. No, I don't remember – I remember being disappointed, discouraged, but, you know, I've been in a lot of higher places and had, you know, negative personnel things to deal with. And so it was just a matter of disappointment. It did affect my way that I perceived Mr. Ceballos, totally.

[111] Q. Well, it sounded like from earlier testimony that the relationship changed from your perspective, in the sense Mr. Ceballos was avoiding you?

A. Correct.

Q. And he, in fact, is transferred out to El Monte?

A. Correct.

Q. Okay. Now, El Monte is still part of your authority as the head deputy of Pomona?

A. Correct.

Q. All right. So do you continue to have a professional relationship with him in terms of supervision?

A. Not after the grievance. I told the director I would make no decisions regarding him, although he remained in El Monte. I wasn't going to have anything to do with him.

Q. Okay. Then who would have been supervising him?

A. Well, there was a deputy in charge. There was a deputy in charge of Rio Hondo, and I'm trying to remember who that might have been at the time.

Q. Okay, You know what, I probably have that in my record.

A. There's a DIC out there. DIC is short for

* * *

[117] don't – and I don't know whether the policy was implemented prior to Mr. Garcetti's departure as D.A. or not. I don't know.

BY MR. BECERRA:

Q. Okay. And I'm just going to jump around a little bit, and then we'll be through.

A. Okay.

Q. To your knowledge, did Ms. Najera ever attempt to get Mr. Ceballos to change his testimony in any way before he testified on the motion to traverse the warrant?

A. Well, I don't know of – if you're asking me whether she did something with Mr. Ceballos when the

two of them were talking and I wasn't present, I don't know that that occurred because I wasn't there. I can tell you that I do not believe that it ever occurred because of her marching orders. I told her that I wanted Judge Milton to have available to him every – every piece of information out there so that he could make an informed decision.

Q. After the Perrin case was taken, the 187 case was taken from Mr. Ceballos and transferred to another deputy, were any new 187 cases assigned to, Mr. Ceballos, to your knowledge?

A. I would think not. I would think not.

[118] Q. And would that have been because of the transfer in his position?

A. Well, no, not necessarily. First of all, there wasn't – we had a real – I mean, it's funny in the business how you think it's a – you know, we didn't have a lot of murders. We didn't have a lot of murders. Good thing for the public; bad thing for the D.A.'s office. Because the lawyers want to try homicide cases, and it just so happens that if you eliminate the hard-core section, which took all the murders, that there just wasn't all that homicide during that period of time. So I'm not sure that his transfer to filing had any bearing on that or not, although it may well have.

Q. Were you interviewed by anyone who claimed to be representing Mr. Ceballos in connection with the grievance procedure?

And who I'm thinking of, for example, Mr. Busanich.

A. No.

Q. And you knew Mr. Busanich?

A. Oh, I know him.

Q. You have a little smile on your face there.

Is he another deputy who's been in the office for a significant time, such as yourself?

* * *

PLAINTIFF'S EXHIBIT B

Year: 2000

GOM No: 00-74

GENERAL OFFICE MEMORANDUM 00-74

To: ALL DISTRICT ATTORNEY PERSONNEL
From: GIL GARCETTI
District Attorney
Subject: PROMOTIONS
Date: AUGUST 28, 2000

I am pleased to announce the following Deputy District Attorney IV promotions effective August 25, 2000:

Lori Ann Aiu
David Brougham
Kathleen Cady
Jonlyn Callahan
George Castello
Deanne Castorena
Donald Clem
Valerie Cole
Debra Cole-Hall
Natasha Cooper
Dale Cutler
Jessica Dabney
Patricia Doyle
Larry Droeger
Frank Duarte
Anthony Ellis
Joseph Esposito
Gretchen Ford
Manuel Garcia, Jr.
Teresa Gomez
Scott Goodwin
Richard Goul
Fernando Guzman
Mary Hanlon-Stone
Georgia Huerta
Steven Katz
Laura Laesecke
Cheri Lewis
Ana Lopez
Michael Mallano
Scott Millington
Kateri Modder
John Morris

John Nantroup, Jr.
Maria Palomino
Shonte Penland
Michael Pettersen
Shawn Randolph
Cynthia Rayvis
Laura Rosenthal
Thomas Rubinson
Brian Schirn
Kathryn Solorzano
Kraig St. Pierre

DANILO J. BECERRA, ESQ, SBN 56526
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Attorneys for RICHARD CEBALLOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants	) CASE NO:) CV 00-11106 (AHM) (AJWx))) **SECOND AMENDED COMPLAINT:**)) **1. VIOLATION OF CONSTITUTIONAL RIGHTS, FIRST AND FOURTEENTH AMENDMENTS, 42 U.S.C. § 1983**)) **2. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**)) **DEMAND FOR JURY TRIAL**)) (Filed Oct. 1, 2001)

JURISDICTION

1. This is an action brought pursuant to the laws of the United States, to wit, 42 U.S.C. § 1983. The jurisdiction of the Court is predicted upon said statute and 28 U.S.C. § 1331 (federal question).

2. In addition, plaintiff invokes the supplemental jurisdiction of the Court pursuant to 28 U.S.C. § 1367 over claims based upon laws of the State of California. Each of these state law claims arises out of the same set of operative facts as do the aforesaid claims brought under the laws of the United States and form part of the same case or controversy.

PARTIES

3. Plaintiff RICHARD CEBALLOS (hereinafter plaintiff) is a thirty-six (36) year old male. At all times herein mentioned, plaintiff is, and has been, a citizen of the State of California. Plaintiff RICHARD CEBALLOS, is a Deputy District Attorney III, employed by the District Attorney's Office of Los Angeles County and has been so employed for the last eleven years.

4. Defendant County of Los Angeles, (hereinafter referred to as "COUNTY") is a municipal Corporation, in the County of Los Angeles, in the State of California.

5. At all times herein relevant, Defendant GIL GARCETTI, (hereinafter referred to as "GARCETTI") has been a resident of the County of Los Angeles and was elected as the head of the COUNTY District Attorneys Office by Los Angeles County citizens (LACDA). He is hereby sued in his personal capacity. Defendants FRANK SUNSTEDT and CAROL NAJERA are employed by

COUNTY as Deputy District Attorneys, they are hereby sued in their personal capacity.

6. Defendants FRANK SUNSTEDT and CAROL NAJERA are hereby sued for their personal roles in directing, and ratifying the retaliation against Plaintiff for speaking against, and his refusing to condone the illegal and unconstitutional search of a suspect(s) in a criminal proceeding, and for Plaintiff's attempts to comply with the Constitutional mandates regarding exculpatory discovery to a criminal suspect. Defendants FRANK SUNSTEDT, CAROL NAJERA and GIL GARCETTI, are hereby sued for their roles in retaliating against Plaintiff for speaking out and refusing to condone acts of police misconduct, including perjury, filing of false police reports, and reporting criminal police misconduct.

7. At all times pertinent to this complaint, Defendant GIL GARCETTI was duly elected as District Attorney of the County of Los Angeles, part of his duties being to make and administer all prosecution and attorney personnel-employment policies for LACDA, and to serve as the chief executive and administrative officer for the LACDA. Defendant GARCETTI is sued in his individual and personal capacities.

8. At all times pertinent to this Complaint, the Defendants acted under color of law in their personal capacities; further, the Defendants acted separately and in concert under color of the law. At all times herein, each Defendant was acting as an agent of each other Defendant.

9. At all times pertinent to this Complaint, Defendants separately and in concert executed administrative and attorney personnel-employment policies and customs

established by directive and/or practice, by the County and/or LACDA, and/or officials empowered by law to make or express licensing and regulatory policy for the County and the LACDA; further, the County and LACDA, and those officials empowered by law to make or express law enforcement policy for the County and LACDA have, by words, action and/or inaction caused and/or ratified the unlawful acts of the individual County Defendants, including, but not limited to, a failure to adequately train, control and/or discipline individual County Defendants, or to provide them with the necessary policies, direction and means for addressing the matters involved herein.

10. The individual Defendants, separately and in concert, conspired to engage and engaged in the illegal conduct here mentioned to the injury of Plaintiff of the rights, privileges and immunities secured to Plaintiff by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the United States. One or more of said individual Defendants acted in furtherance of said conspiracy.

11. The individual Defendants, separately and in concert, conspired to engage and engaged in the illegal conduct here mentioned to the injury of Plaintiff of the rights, privileges and immunities secured to Plaintiff by the Constitution and laws of the State of California, thereby denying Plaintiff the equal protection of the laws of the State of California and due process of law rights secured to Plaintiff by the Fourteenth Amendment to the Constitution of the United States. One or more of said individual Defendants acted in furtherance of said conspiracy.

12. The Defendants, and each of them, knew or reasonably should have known that the wrongs here mentioned were about to be committed, and further had the power to prevent or aid in preventing the commission of the same. Despite this, Defendants refused and/or failed to prevent or aid in preventing the commission of said wrongs, and said wrongs were in fact committed, denying Plaintiff his rights secured under the First and Fourteenth Amendments to the Constitution.

FACTUAL ALLEGATIONS FOR ALL CAUSES OF ACTION

13. Plaintiff RICHARD CEBALLOS, is employed for defendant COUNTY as a Deputy District Attorney III, employed by the COUNTY District Attorney's Office, and has been so employed for the last eleven years. Prior to March 2, of the year 2000, and prior to the events that led to this complaint, Plaintiff was working in his official capacity as a Trial Deputy District Attorney in the East District of the Los Angeles County Superior Court. His job duties included full responsibility for the prosecution of criminal defendants charged with murder, and the prosecution of other serious felony cases. On or about March 2, 2000, plaintiff submitted a memorandum entitled *People* vs. *Michael Cuskey,* Case No.: *KA045491,* to defendant FRANK SUNSTEDT, who was the East District's Head Deputy District Attorney for COUNTY. (*People* vs. *Michael Cuskey,* was a criminal case that plaintiff was assigned to prosecute on behalf of the COUNTY District Attorney's office). In said memorandum, plaintiff informed defendants SUNSTEDT and GARCETTI that three COUNTY Sheriff's Department Deputies had engaged in unconstitutional and unlawful misconduct, to wit, misrepresentations of facts and

omissions of material facts they submitted in a sworn affidavit that was used by them to obtain a search warrant of a residence in violation of the Constitution of the United States. Plaintiff further indicated in his memorandum that the affidavit was false, inaccurate, and incomplete, and that the search warrant should be quashed. He further indicated that the aforementioned misconduct should result in having the charges filed against the defendants dismissed. As a direct result of Plaintiff's March 2, 2000 memorandum, (his refusal to condone illegal Sheriff misconduct) Plaintiff was repeatedly subjected to multiple acts of retaliation by defendants SUNSTEDT, NAJERA and his supervisors in the East District's Attorney's office, and, said conduct was directed, approved, and ratified by defendant GIL GARCETTI.

The Defendant's acts of retaliation against Plaintiff for his report of Sheriff Deputy misconduct:

14. On March 6, 2000, in defendant SUNSTEDT's first official response to Plaintiff's March 2, 2000 memorandum, he stated to plaintiff that a COUNTY Sheriff's Department Captain was requesting a meeting prior to the dismissal of the criminal charges in *People* vs. *Michael Cuskey.* On March 9, 2000, plaintiff met with defendant COUNTY, defendants SUNSTEDT and NAJERA, a COUNTY Sheriff's Department Captain, a COUNTY Sheriff's Department Lieutenant, and a COUNTY Sheriff's Department Detective. At said meeting, the Sheriff's Department Lieutenant ordered and demanded the removal and recusal of plaintiff from the *People* vs. *Michael Cuskey,* case. The Sheriff's Department Lieutenant did not say anything regarding the Cuskey case other than accusing plaintiff of acting like a defense attorney and not

a prosecutor. Defendants SUNSTEDT and NAJERA did not object in any manner to the Lieutenant's request and instead agreed and acquiesced in the removal of plaintiff because he would not condone Sheriff's misconduct.

15. On March 14, 2000, defendant SUNSTEDT informed plaintiff that henceforth plaintiff would be reassigned from the position of Trial attorney to a lower level position.

16. On March 14, 2000, plaintiff informed defendants SUNSTEDT and NAJERA that he was subpoenaed by the defense attorney in *People* vs. *Michael Cuskey,* on a Motion to Traverse the search warrant in the Cuskey case.

17. On March 15, 2000, defendant NAJERA removed plaintiff from another murder case previously assigned to plaintiff and reassigned the murder case to a different inexperienced grade 2 Deputy District Attorney that had never previously tried a murder case. On March 16, 2000, plaintiff reiterated his belief to defendant NAJERA that the Sheriff's Department deputies had lied in the affidavit for the search warrant and that if plaintiff was called to testify at the Motion to Traverse hearing, he would disclose that information. Thereupon, Defendant NAJERA verbally reprimanded and berated plaintiff by telling plaintiff that his actions and statements of reporting the Sheriff Deputies misconduct would get plaintiff "in trouble with the District Attorney's office". NAJERA's acts was an attempt to intimidate plaintiff in a concerted attempt to dissuade plaintiff from testifying truthfully at the Motion to Traverse hearing and was an attempt to coerce plaintiff to ratify illegal Sheriff misconduct.

18. Following the Motion to Traverse hearing heard on March 20, 2000, Defendants SUNSTEDT and NAJERA

did *not* assign any further murder cases to plaintiff and retaliated further against plaintiff by giving plaintiff the "silent treatment" and then creating a hostile work environment for plaintiff.

19. Another act of retaliation occurred on August 25, 2000, as plaintiff was denied a promotion to Grade IV by defendants, GARCETTI, SUNSTEDT and NAJERA, even though plaintiff had scored 100 in the oral exam and had received outstanding evaluations from his supervisors in the previous two years and prior to reporting the misconduct. Finally, on August 28, 2000, the Defendant's retaliated against plaintiff by having plaintiff reassigned to the Rio Hondo District of the Los Angeles Municipal Court, to simply work as a District Attorney Filing Deputy.

20. Defendant, District Attorney, GIL GARCETTI, was aware of the retaliation plaintiff was being subjected to. However, defendant GARCETTI was more concerned with his reelection in a very tight run-off for the District Attorney's office, and he did not want to alienate Sheriff's Department and other Law Enforcement agencies that previously supported him. Defendant GARCETTI also agreed and acquiesced in the retaliation of plaintiff in order to punish plaintiff for his failure to condone the exposed Sheriff misconduct, and for Plaintiff's attempts to publicly take his grievance and the misconduct issues to the Mexican American Bar Association, a public forum.

21. Plaintiff has filed timely claims with the CITY OF LOS ANGELES City Clerk's Office, with regards to its State Causes of action. Plaintiff timely filed the appropriate internal grievance through the internal guideline set forth in the District Attorneys Office. In his grievance

Plaintiff complained that he was being singled out and retaliated against as stated above.

22. While Plaintiff's internal employment grievance was pending, Plaintiff sought the assistance of a non-profit legal bar association, the Mexican American Bar Association, (hereinafter MABA). Plaintiff contacted the President of MABA and asked him if he could be placed on the MABA board's agenda at its next meeting to address his case to the MABA board. In response to Plaintiff's request, the MABA president contacted defendant GIL GARCETTI and informed him of Plaintiff's request. Defendant GIL GARCETTI advised the MABA president that there was no need for MABA to hear Plaintiff, that he was aware of plaintiff's grievance, and that he would "take care of the situation". Approximately two days after attempting to meet with MABA, Plaintiff's grievance was denied and plaintiff was thereafter transferred to an undesirable court house to work as a filing deputy.

23. The defendants, and each of them, knew or reasonably should have known that the wrongs mentioned herein were about to be committed, and further had the power or aid in preventing the commission of the same. Despite this defendants refused and/or failed to prevent or aid in preventing the commission of said wrongs, and said wrongs were in fact committed, denying plaintiff his rights secured under the First and Fourteenth Amendments to the Constitution.

24. As a result of the retaliation, harassment, and mistreatment of plaintiff, his job as a District Attorney has become totally unbearable and he is subjected daily to a hostile work environment.

FIRST CAUSE OF ACTION

VIOLATION OF CONSTITUTIONAL, RIGHTS; FIRST AND FOURTEENTH AMENDMENTS, 42 U.S.C. §1983 Against Defendants FRANK SUNSTEDT, CAROL NAJERA, GIL GARCETTI, and Does 1 through 10, inclusive, in their personal capacities

25. Plaintiff restates and incorporates by reference each and every allegation contained in paragraphs 1 through 24 inclusive, as though fully set forth herein.

26. In perpetrating the above described acts and omissions, defendants SUNSTEDT, NAJERA and GARCETTI were, at all relevant times herein, its agents/employees. Therefore, defendants' above-described acts and omissions constitute cognizable state action under color of state law.

27. In perpetrating the above-described acts and failures to act, the defendants, and each of them, engaged in of restraining plaintiff's free speech on a matter of public concern and retaliating against Plaintiff because of such speech, in violation of the First Amendment to the United States Constitution. Because rights under the Constitution are federally protected, defendants also violated plaintiff's rights under 42 U.S.C. §1983.

28. As a direct and proximate result of the unlawful conduct of defendants, and each of them, as alleged herein, plaintiff has suffered and will continue to suffer loss of seniority, earnings, employment and retirement benefits and promotional opportunities in an amount as yet not specifically ascertained but subject to proof of trial.

29. As a direct and proximate result of the unlawful conduct of the defendants, and each of them, as alleged herein, plaintiff has suffered and continues to suffer humiliation, mental anguish and emotional distress, including, but not limited, to anxiety, depression, fear, irritability, aversion to leaving his house, withdrawal, and loss of productive work time, and he has incurred costs, all in an amount as yet ascertained but subject to proof at trial.

30. The conduct of defendants, and each of them, as alleged herein, is ongoing and continuous. Because defendants' treatment of plaintiff impacts plaintiff's emotional state as well is his ability to find alternative employment, legal remedies alone are insufficient.

31. All of the actions of the defendants alleged herein, separately and in combination, deprived Plaintiff of substantive due process rights by unlawfully depriving him of his liberty interest in pursuing his profession and advancement therein; and maintaining his professional reputation, standing, and ability to earn an income.

SECOND CAUSE OF ACTION

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)
Against Defendants FRANK SUNSTEDT, CAROL NAJERA, and Does 1 through 10, inclusive, in their in their [sic] personal capacities]

32. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 31, inclusive, hereof as though fully set forth herein.

33. As described above, defendants and their agents/employees and Does 1 through 10, inclusive, engaged in

outrageous conduct towards plaintiff with the intention to cause, or with reckless disregard for the probability of causing, plaintiff to suffer, inter alia, severe physical and emotional distress. Plaintiff suffered damages as a consequence of the specific use of official power to deter a particular protected activity – the proper reporting of on-the-job or job-related unlawful government actions. The distress was a result of conduct and/or risks not within the compensation bargain. To the extent that said outrageous conduct was perpetrated by certain defendants, the remaining defendants confirmed and ratified said conduct with the knowledge that plaintiff's emotional and physical distress would thereby increase, and with a wanton and reckless disregard for the deleterious consequences to plaintiff.

34. As a direct and legal result of defendants' wrongful actions and failures to act, plaintiff has suffered and will continue to suffer significant physical injury, pain and suffering, and extreme and severe mental anguish and emotional distress; she [sic] has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and other incidental expenses.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment as follows:

1. For compensatory damages including lost wages, vacation benefits, medical bills, mental and emotional distress, an [sic] other special and general damages according to proof;

2. For an award of interest, including pre-judgment interest, at the legal rate;

3. For a permanent injunction enjoining defendants, their agents, successors, and employees, and those acting in concert with them, from engaging in each of the unlawful practices, policies, usages, and customs complained of herein and providing such other injunctive relief as the court may deem proper;

4. For reasonable attorneys' fees pursuant to 42 U.S.C. §1988 and California Code of Civil Procedure §1021.5, and any other appropriate statutes;

5. For costs of suit incurred herein;

6. For a jury trial on all issues so triable; and

7. For such other and further relief as the court may deem just and proper.

DEMAND FOR JURY TRIAL

COME NOW Plaintiff to the present action and request that this court assign the present matter for jury trial.

DATED: October 1, 2001

MORENO, BECERRA,
GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ [Illegible]
DANILO J. BECERRA, Esq.
Attorneys for Plaintiff
RICHARD CEBALLOS

[Proof Of Service Omitted In Printing]

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and CAROL NAJERA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	) Case No.) CV 00-11106 AHM (AJWx)) Honorable A. Howard Matz) **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF INDIVIDUAL ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES** [F.R.C.P. 56] Date: January 7, 2002 Time: 10:00 a.m. Courtroom: 14 [Declaration of Cindy S. Lee and Exhibits; Statement of Uncontroverted Facts and Conclusions of Law; and Proposed Judgment filed concurrently herewith] (Filed Dec. 18, 2001)

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 7, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom "14" of the above-referenced Court located 312 North Spring Street, Los Angeles, California 90012, defendants GIL GARCETTI, FRANK SUNDSTEDT and CAROL NAJERA will and do hereby move this Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for an order granting summary judgment in favor of defendants and against plaintiff RICHARD CEBALLOS.

Alternatively, Defendants request that the Court summarily adjudicate issues in their favor for the following reasons:

1. With regard to the First Cause of Action alleged in Plaintiff's Second Amended Complaint ("SAC"):

a) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because plaintiff did not engage in speech protected by the First Amendment;

b) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because they did not violate a clearly established constitution right; and

c) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because their conduct was objectively reasonable at all relevant times.

2. With regard to the Second Cause of Action alleged in Plaintiff's SAC:

a) Defendants Sundstedt and Najera did not engage in extreme and outrageous conduct as a matter of law;

b) Defendants Sundstedt and Najera did not cause plaintiff to suffer severe or extreme emotional distress; and

c) Defendants Sundstedt and Najera are nevertheless entitled to immunity under California Government Code § 821.6.

This Motion is made following counsel for Defendants' unsuccessful attempt to meet and confer pursuant to Local Rule 7.4.1 several times shortly after October 24, 2001. (*See*, Declaration of Cindy S. Lee.)

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the declarations and exhibits filed herewith, the Separate Statement of Undisputed Material Facts and Conclusions of Law, and upon such further evidence, both oral and documentary, as may be presented at the hearing of this Motion.

DATED: December 17, 2001

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ Cindy S. Lee
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI, FRANK
SUNDSTEDT, and
CAROL NAJERA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff is a Grade Level III Deputy District Attorney with the Los Angeles County District Attorney's Office who alleges he was subjected to adverse employment actions by former District Attorney Gil Garcetti, former Head Deputy District Attorney Frank Sundstedt and Grade Level IV Deputy District Attorney Carol Najera in retaliation for his opinions and statements relating to a criminal case entitled *People v. Cuskey*. Specifically, plaintiff contends that his opinions and statements relating to the *Cuskey* matter led to the following acts of retaliation by defendants Garcetti, Sundstedt and Najera: (1) plaintiff was removed as a calendar deputy at the Pomona branch and ultimately re-assigned as a filing deputy in El Monte; (2) one of his murder cases was re-assigned to a lesser experienced

prosecutor; (3) he was not assigned any new murder cases; and (4) he was denied a Grade IV Level position.

After amending the complaint two times, plaintiff has set forth the following causes of action: (1) 42 U.S.C. § 1983 claim for alleged violations of plaintiff's First and Fourteenth Amendment rights against Mr. Garcetti, Mr. Sundstedt and Ms. Najera; and (2) state claim for intentional infliction of emotional distress against Mr. Sundstedt and Ms. Najera. Plaintiff's claims against defendants are limited to personal capacity claims.[1] (Second Amended Complaint ["SAC"] 7:17, 8:20.) As more fully set forth below, there are no material facts reasonably in dispute as to the foregoing claims. Rather, this case essentially turns on whether, as a matter of law, plaintiff has engaged in speech warranting the protection of the First Amendment.

II. STATEMENT OF FACTS.

A. Plaintiff's Involvement In The *People v. Cuskey* Matter.

Plaintiff has been employed as a deputy District Attorney with the Los Angeles County District Attorney's Office since 1989. While plaintiff was assigned as the calendar deputy at the Pomona branch, he was approached by a criminal defense attorney, Richard Escobedo, who represented one of the defendants in the case of *People v. Cuskey* which had been assigned to another

[1] Plaintiff's *Monell* claim against the County of Los Angeles and the official capacity claims against the individual defendants were dismissed following this Court's ruling on defendants' Motion for Summary Adjudication.

deputy District Attorney, Steve Gallon. Mr. Escobedo told plaintiff that he believed that the arresting Sheriff's deputies from the Industry Station may have lied in the search warrant affidavit and requested that plaintiff review the case. Plaintiff apparently reviewed the affidavit and other documentary evidence, and concluded that the property described in the affidavit had been mischaracterized. After further investigation, plaintiff discussed the matter with Head Deputy District Attorney Frank Sundstedt and plaintiff's immediate supervisor Carol Najera who purportedly agreed that there was a problem.

After further investigation, plaintiff prepared a memorandum/disposition report on March 2, 2000 setting forth a summary of his investigation, his conclusions that the affidavit was falsified and misleading and his recommendation that the *Cuskey* case be dismissed. Plaintiff sent the memorandum/disposition report to Mr. Sundstedt who was the Head Deputy District Attorney at the Pomona branch. Upon reviewing the memorandum, Mr. Sundstedt agreed that there were problems with the *Cuskey* case but recommended that plaintiff revise the memorandum so that it did not include conclusions and blatant statements accusing the Sheriff's deputies of committing felonious perjuries that had not been proven. After plaintiff omitted those accusatory conclusions from his memorandum, Mr. Sundstedt contacted the appropriate captain at the Sheriff's Department's Industry Station to advise him that he thought there was a problem with the *Cuskey* case and requested a meeting to discuss it.

On March 9, 2000, a meeting was held at Mr. Sundstedt's office attended by a Sheriff's captain and lieutenant, the deputy sheriff who prepared the search warrant affidavit, plaintiff, Mr. Gallon, Mr. Sundstedt and

Ms. Najera. Upon listening to what the deputy sheriff who prepared the search warrant affidavit had to say at the meeting, Mr. Sundstedt believed that the best course of action was to proceed with the Motion to Traverse the Warrant[2] which had already been filed by the defense in the *Cuskey* case so that a neutral judicial officer could hear the testimonies and assess the evidence and make a determination as to whether the search warrant affidavit was falsified, misleading or otherwise improper. Plaintiff did not continue to request the dismissal of the *Cuskey* case after the meeting.

Plaintiff was subpoenaed by the defense in the *Cuskey* case to testify at the Motion to Traverse hearing which was to be heard by Judge David Milton. Plaintiff was the calendar deputy for Judge Milton at that time and had been so for about one year. Plaintiff testified at the Motion to Traverse hearing on March 20, 2000, and the Motion was denied after Judge Milton considered all of the evidence. One of the defendants in the *Cuskey* case was subsequently convicted after a jury trial and the other two defendants entered guilty pleas.

B. Plaintiff's Allegations Of Retaliation.

Plaintiff contends that his opinions and statements relating to the *Cuskey* matter led to the following acts of retaliation by Mr. Sundstedt, Ms. Najera and Mr. Garcetti: (1) plaintiff was removed as a calendar deputy at the Pomona branch and ultimately re-assigned as a filing deputy in El Monte; (2) one of his murder cases

[2] A Motion to Traverse is basically an attack on the credibility of the search warrant affiant. (Exhibit "B," Plaintiff's Depo., 103:10-24.)

was re-assigned to a lesser experienced prosecutor (Mr. Gallon); (3) he was not assigned any new murder cases; and (4) he was denied a Grade IV position. The facts not reasonably in dispute, however, demonstrate that the foregoing employment decisions had nothing to do with the *Cuskey* matter.

(1) Non-Retaliatory Reasons For Re-Assignment To El Monte:

In April 2000, the Pomona branch eliminated two calendar courts. Prior to then, it had four calendar courts, two of which were staffed by Grade IV calendar deputies, and two of which were staffed by Grade III deputies (one of which was plaintiff). Mr. Sundstedt decided that the two remaining calendar courts should have two calendar deputies and plaintiff was thereafter placed as a co-calendar deputy with a Grade IV deputy. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve.

In mid-August, 2000, the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. The fact plaintiff got transferred to be a filing deputy is because he was treated

identically with every other Grade III deputy that Mr. Sundstedt staffed. Moreover, because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy. Plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one with his experience and that being transferred to El Monte would require a longer commute. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000.

(2) Non-Retaliatory Reasons For Re-assignment Of A Murder Case To A Grade Level II:

As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera went to all the calendar deputies and gathered a brief synopsis of all murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to Grade II deputy Steve Gallon was plaintiff's and the other Grade II received a murder case from another Grade III deputy.

(3) Non-Retaliatory Reasons For No Assignment Of New Murder Cases:

The number of new murder cases that would be assigned to trial deputies in the Pomona branch depended on the murder rate in Pomona. Plaintiff was not assigned any new murder cases between the time of the hearing on the Motion to Traverse on the *Cuskey* case on March 20, 2000 and his transfer of plaintiff to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona. There was simply no effort to deprive plaintiff of assignment of murder cases.

(4) Non-Retaliatory Reasons For Denial Of Grade Level IV Position:

Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. He was one of ten Grade IIIs from the Pomona branch who was considered promotable based upon his scores from the written exam and appraisal of promotability analysis. As Head Deputy of the Pomona branch, Mr. Sundstedt was responsible for scoring the appraisal of promotability and he gave the same outstanding scores for eight out of the ten Grade III candidates under his supervision. Plaintiff was one of the eight Grade III candidates who received the same outstanding scores on the appraisal of promotability analysis. Of the eight Grade III candidates that Mr. Sundstedt rated equally outstanding, four received the Grade IV promotions. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy.

On August 25, 2000, a total of 44 Grade III deputies were promoted to Grade IV deputies. Other than scoring the appraisal of promotability, the only other involvement that Mr. Sundstedt had in the promotion process was to opine to the Director of the Branch and Area Operations of his top four candidates whom he believed should get the Grade IV position. It turns out that of the four Mr. Sundstedt opined were the most deserving, only two were promoted. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's involvement in the same prior to his approval of the recommendation list of Gra[d]e IV promotions. As such, there is simply no merit to plaintiff's allegation that he was denied the Grade IV position as a result of his involvement in the *Cuskey* case.

On September 5, 2000, plaintiff filed a Grievance against Mr. Sundstedt and Ms. Najera alleging that they retaliated against him as a result of his reporting that certain officers may have fabricated probable cause to obtain the search warrant in the *Cuskey* case. On October 5, 2000, after a full hearing, the plaintiff's Grievance was denied at the Second Level Hearing. Plaintiff did not appeal this decision or attempt to further pursue his Grievance. Instead, plaintiff filed this instant civil action on October 18, 2000.

III. SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE IS NO ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Summary judgment must be rendered when there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56(c); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Further, if summary judgment is not granted on the entire action, a court may render partial summary judgment on individual issues as to which there remains no genuine issue of material fact. Federal Rules of Civil Procedure, Rule 56(b), (d).

IV. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AS TO PLAINTIFF'S FIRST CAUSE OF ACTION BROUGHT UNDER SECTION 1983.

The Supreme Court recently clarified the procedure to be used by the district court in determining whether officials sued in their individual capacities are entitled qualified immunity. *Saucier v. Katz*, 121 S.Ct. 2151 (2001). The court must consider the initial threshold inquiry of whether, taking the facts in the light most favorable to the plaintiff, the defendant/official's conduct violated a constitutional right of the plaintiff. *Id.* at 2156. If not, the qualified immunity analysis ceases and the officials are entitled to immunity. *Id.* If the court determines a constitutional violation has occurred, the court must ask the next question: "whether the right was clearly established" at the time of the violation. *Id.* "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.* Finally, if the court determines that the right was clearly established at the time of the official action, the court must determine whether the conduct of the official was reasonable in light of the clearly established law at the time.

A. Defendants Did Not Violate A Constitutional Right Because Plaintiff's Speech Was Not Protected By The First Amendment.

The inquiry as to whether speech is protected under the First Amendment in a public employment context is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). In order for a public employee's speech to be protected under the First Amendment, the employee must first establish that his speech was a matter of public concern. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). If the employee fails in this initial burden, "it is unnecessary . . . to scrutinize the reasons" for the employer's action. *Connick*, *supra*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Plaintiff in the instant case has not and cannot establish that his speech was a matter of public concern. Specifically, plaintiff claims that he notified Head Deputy District Attorney Sundstedt in a March 2, 2000 internal memorandum that Los Angeles County Sheriff's Department deputies had engaged in unconstitutional and unlawful misconduct, that the affidavit used to support the issuance of a warrant in the case of *People v. Michael Cuskey* (Case No. KA045491) was false, and that the case against Cuskey should be dismissed. (SAC, ¶13). These statements and opinions are not of public concern. The Ninth Circuit has "acknowledged that a 'narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech.'" *Brewster v. Board of Education*, 149 F.3d 971, 981 (9th Cir. 1998), *cert. denied*,, 526 U.S. 1018 (1999) (quoting *Roe v. City & County of San Francisco*, 109

F.3d 578, 585 (9th Cir. 1997)). Here, plaintiff never notified the media or any officials other than his direct supervisors (i.e., Sundstedt and Najera) regarding the issues contained in the March 2, 2000 memorandum to Mr. Sundstedt. This constitutes a limited focus and limited audience and therefore weighs against a claim of protected speech.

Moreover, to the extent plaintiff criticized the decision of his superiors to pursue the *Cuskey* case despite plaintiff's opinions that the search warrant affidavit was falsified, that also cannot serve the basis of his First Amendment claim. The decision to prosecute a case is at the very core of prosecutorial discretion and is therefore a matter only of internal District Attorney's Office concern. Courts have recognized the need to grant the District Attorney such broad decision making privileges in the institution of absolute prosecutorial immunity.[3] Thus, plaintiff's speech was not a matter of public concern because it was directed only towards internal District Attorney discretionary decision making and prosecutors enjoy absolute immunity for the decision to prosecute. *Burns v. Reed*, 500 U.S. 478, 486 (1991). Thus, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide

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[3] Prosecutors are "absolutely immune from liability under section 1983 for their conduct in 'initiating a prosecution and in presenting the State's case' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (internal citations omitted). Prosecutors are immune if the actions of the prosecutor are performed as part of the prosecutor's preparation of his case, even if they are able to be characterized as investigative or administrative. *Freeman v. Hittle*, 708 F.2d 442 (9th Cir. 1983) (per curiam).

latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers, supra*, 461 U.S. at 146.

Even assuming, arguendo, plaintiff's speech constituted a matter of public concern, the "*Pickering*" balancing test weighs in favor of defendants. "The 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment, and thus 'ensures that a court will test the reasons for restriction against first amendment standards.'" *Brewster, supra*, 149 F.3d at 979. This second step requires the court to conduct a *Pickering* balancing test. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick, supra,* 461 U.S. at 148 n.7. In doing so, the court weighs the plaintiff's interest in the protected speech versus the State's interests in ensuring workplace efficiency and avoiding workplace disruption. This balancing test must **clearly** favor the plaintiff in order for a claim of qualified immunity to be defeated. *Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999). The Court in *Lytle* held that "we must decide whether the outcome of the *Pickering* balancing test so **clearly** favored [Plaintiff] that it would have been patently unreasonable for the [Defendants] to conclude that their actions were lawful." *Id.* (italics in original, emphasis added).

"In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.'" *Brewster, supra,* 149 F.3d at 979 (citing *Connick v. Myers*, 461 U.S. 138, 151.)

Moreover, an important factor for the court to consider in the *Pickering* balancing test is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague." *Id.*; *see also, Brewster, supra*, 149 F.3d at 978, 981 and *Roe, supra,* 109 F.3d at 585. The Ninth Circuit has held that this factor is extremely important in the analysis: "[a] narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech." *Id.* In this case, as more fully set forth above, plaintiff himself did not feel that his opinions were matters of public concern. Rather, he believed them to be a matter of internal District Attorney's office concern, which is why he confined his opinions to a memorandum to his supervisor. "Speech focused solely on *internal policy and personnel grievances* does not implicate the First Amendment." *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (overturned on other grounds) (emphasis added).

Furthermore, in conducting the *Pickering* balancing test, the district court may also consider whether the statement was false or made with reckless disregard of the truth. *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998); *Brewster*, supra, 149 F.3d. at 981; *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995). In the instant case, contrary to plaintiff's opinions relating to the Cuskey matter, Although plaintiff in this case properly brought his concerns relating to the *Cuskey* matter, in denying the Motion to Traverse, a Superior Court Judge found that the sheriff's deputies did not lie, commit misrepresentations of facts, or omit material facts in their sworn affidavit as suggested by plaintiff. (*See* SAC ¶13). This finding raises the presumption that plaintiff made a false statement or otherwise recklessly disregarded the truth relating to the *Cuskey* matter.

"Although [plaintiff's] untrue speech may not be per se unprotected, the district court's finding of falsity certainly undermines Moran's First Amendment interest for balancing purposes." *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998) (citing *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995) (internal citation omitted). The same presumption arises in the instant case. Plaintiff had all the evidence that a neutral judicial officer had to consider and disregarded the evidence that the deputies were innocent of plaintiff's accusations against them. Indeed, even though plaintiff testified in the *Cuskey* Motion to Traverse hearing, a judge found as a matter of fact, that plaintiff's observations and investigations simply did not support the conclusion that the search warrant affidavit had been falsified. Thus, as in *Moran*, this finding of falsity substantially weakens any First Amendment protection afforded to plaintiff.

Thus, plaintiff's "speech" was not protected by the First Amendment.

B. The Law Was Not Clearly Established Preventing The Defendants' Actions.

Even assuming, arguendo, plaintiff engaged in protected First Amendment speech, defendants are nevertheless entitled to qualified immunity. Plaintiff bears the burden of proving the rights he alleges to have been violated were clearly established. *Romero v. Kitsop County*, 931 F.2d 624, 627 (9th Cir. 1996). As set forth in detail above, the *Pickering* balancing test does not weigh **clearly** in favor of plaintiff. (*See infra* Part IV.A.) Thus, this court "must determine whether the specific facts of this case present one of those **rare** instances in which

Pickering rights are, despite balancing, clearly established." *Id.* (emphasis added). Courts have recognized that the *Pickering* balancing test will rarely weigh *clearly* in favor of plaintiff. Where the *Pickering* balancing factors do not weigh **clearly** in favor of plaintiff, the law cannot be said to be clearly established. In other words, the court must decide "whether the *Pickering* test so clearly favors [plaintiff] that it would have been unreasonable for the officials to believe that [the adverse employment actions taken against the plaintiff were] lawful." *Id.* at 981.

Here, plaintiff must cite sufficient facts to support the "content-specific, fact-intensive" *Pickering* balancing test in his favor as described by the court in *Moran*. Plaintiff in this case has not and cannot do so. Plaintiff merely suggests that he was subjected to retaliation for pursuing his First Amendment rights. However, "[t]he legal right at issue is not the generic right to free speech. "As the qualified immunity defense has evolved, it provides ample protections to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Defendants here have not blatantly violated plaintiff's First Amendment rights. Indeed, there are *serious* and substantial questions as to whether the Plaintiff's speech even constituted protected speech under the First Amendment. "The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (citations omitted). If defendants are subjected to suit every time they take an administrative employment-related action that happens to be contemporaneous with an employee's speech, their duties will be unduly interfered with and they will be

subjected to potentially disabling threats of liability. This is exactly what qualified immunity seeks to prevent. Therefore, qualified immunity must be granted to all defendants as to plaintiff's section 1983 claim.

C. Defendants' Actions Were Objectively Reasonable Under The Circumstances.

The third and final factor in the determination of whether public officials acting in their individual capacities are entitled to qualified immunity is whether their actions were objectively reasonable under the circumstances. *Saucier*, *supra*, 121 S.Ct. 2151. The Court need only reach this question if it first finds that 1) defendants violated a constitutional right of plaintiff, and 2) that plaintiff's right was clearly established at the time of the violation. *See Id.* at 2156. "[T]he question is whether the [official's] actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 2161 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

All defendants in this case acted objectively reasonably with regard to each of the adverse employment actions plaintiff complains about. First, plaintiff's responsibilities as a calendar deputy were removed not because of plaintiff's speech, but rather, it was the result of the consolidation of the courts in Pomona. Before consolidation, there were four direct calendar courts, one of which plaintiff served as calendar deputy. After consolidation, there were only two calendar courts. This left Mr. Sundstedt with two Grade III calendar deputies (of which plaintiff was one) and two Grade IV calendar deputies to staff only two calendar courts. Because Mr. Sundstedt did not feel it appropriate to remove calendar assignments from any of

the four calendar deputies, he made them all co-calendar deputies.

Secondly, plaintiff's re-assignment to Rio Hondo court in El Monte was not the product of retaliation. Rather, it was necessary to accommodate the filing needs within the Pomona branch that Mr. Sundstedt was responsible for filling. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve until mid-August, 2000, when the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. Mr. Sundstedt's intention was to transfer another part-time deputy from El Monte to handle the misdemeanor filings in Pomona. That would leave only two deputies in El Monte as filing deputies, one of whose duties were limited to filing misdemeanors. Mr. Sundstedt also believed that the Deputy in Charge in El Monte was filing too much and needed to devote more time to supervision of new deputies assigned to that office. As such, he felt that two felony-filing deputies would then be required in El Monte. Since plaintiff was next in line to be rotated into a filing position, Mr. Sundstedt believed that he should be transferred to El Monte as a felony-filing deputy. Mr. Sundstedt thereafter turned over the filing deputy assignments to Ms. Najera, the Assistant Head Deputy

District Attorney of the Pomona branch, as he was going out of town. Because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy. Plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one with his experience and that being transferred to El Monte would require a longer commute. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000.

Also meritless is plaintiff's claim that one of his murder cases was removed and re-assigned to another deputy district attorney in retaliation for his purported speech. As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that his deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera found four murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to a Grade II was plaintiff's and the other Grade II received a murder case from another Grade III deputy. Mr. Sundstedt chose the *Perrin* case, previously assigned to plaintiff, because he believed the nature of the case was

suitable to provide a promising Grade II deputy with experience trying a homicide case.

Equally unsupported by evidence is plaintiff's contention that he was not assigned any new murder cases because of his purported speech. The fact of the matter is, plaintiff was not assigned any new murder cases between the time of the Motion to Traverse hearing on the *Cuskey* matter on March 20, 2000 and his re-assignment to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona during that time. There is simply no evidence of any retaliatory motive on the part of any of the defendants to preclude him from new murder assignments.

Finally, plaintiff's allegation he was denied the Grade IV promotion in retaliation for his purported speech is based purely upon conjecture and speculation on his part. Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. He was one of ten Grade IIIs from the Pomona branch that Mr. Sundstedt recommended to be promoted based upon his scores from the written exam and appraisal of promotability analysis. Of the ten candidates, Mr. Sundstedt rated eight equally outstanding, including plaintiff. Four of these eight candidates were actually promoted. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy after the Chief Deputy has meetings and discussions with the Directors of all the branch offices and the three Assistant District Attorneys. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's

involvement in the same at the time he agreed with the recommendations of his Chief Deputy on the Grade IV promotions.

Simply stated, the material facts not reasonably in dispute all demonstrate the existence of lawful and justified administrative reasons for the adverse employment actions alleged by plaintiff. Therefore, defendants are entitled to qualified immunity from suit.

V. PLAINTIFF'S SECOND CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS WITHOUT MERIT.

Plaintiff's intentional infliction of emotional distress claim is asserted against defendants Sundstedt and Najera only and is apparently based upon their response to plaintiff's statements and opinions relating to the *Cuskey* matter. The elements that plaintiff must prove in order to constitute a valid cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993) (quoting *Christensen v. Superior Court* (Cooperman), 54 Cal. 3d 868, 903 (1991)).

In the instant case, plaintiff has not and cannot satisfy the first two elements of this tort. Furthermore, defendants Sundstedt and Najera are nevertheless entitled to immunity from suit under Government Code § 821.6.

A. The First Element Requiring Outrageous Conduct By Defendants Fails As A Matter Of Law.

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593 (1979). The "conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous!'" *KOVR-TV, Inc. v. Superior Court* (Cecchettini), 31 Cal. App. 4th 1023, 1028 (1995) (quoting Rest. 2d Torts, § 46 com. d.).

In the instant case, as more fully set forth above, defendants' Sundstedt and Najera's conduct has been nothing but proper and reasonable in light of their duties and obligations as Head Deputy and Assistant Head Deputy District Attorneys of the Pomona branch, respectively. In other words, their handling of the *Cuskey* matter simply does not rise to the level of actions that exceed the bounds tolerated by a civilized community.

> "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, **even if improper motivation is alleged**."

Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80 (1996). The court in *Janken* added that "[w]hile it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid making personnel decisions or to prevent the claim that those decisions were discriminatory." *Id.* at 63-64.

Defendants in this case did nothing more than make independent, justifiable personnel decisions regarding plaintiff. It is these purely personnel-related decisions that plaintiff claims are the cause of his emotional distress. However, as noted by the California Court of Appeal, personnel decisions are not outrageous actions even if the motivation behind them is improper. Therefore, despite plaintiff's allegation that the adverse employment actions were taken against him in retaliation for his speech, such conduct, even if true, does not arise to the level of outrageousness required to sustain a cause of action for intentional infliction of emotional distress. For the foregoing reasons, the first element of intentional infliction of emotional distress fails.

B. <u>The Second Element Requiring Plaintiff To Show Severe Or Extreme Emotional Distress Also Fails As A Matter Of Law.</u>

Plaintiff has also failed to prove the second element of the tort, that he has suffered severe or extreme emotional distress. Plaintiff may recover for intentional infliction of emotional distress only when he has, in fact, suffered severe emotional distress. *Girard v. Ball*, 125 Cal. App. 3d 772, 787 (1981). For emotional distress to be severe, "[B]oth the intensity and duration of the emotional distress suffered must be considered in determining its severity. Severe emotional distress means 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Kiseskey v. Carpenters' Trust for So. California*, 144 Cal. App. 3d 222, 231 (1983) (citing *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 397 (1970).) Whether the emotional distress suffered

by plaintiff can be reasonably be found to be severe is a question of law to be initially determined by the trial court. *Fletcher., supra,* 10 Cal.App.3d at p. 397.

In *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617 (1985), the court held that mere allegations that the plaintiff suffers emotional distress without facts indicating the nature or extent of such mental suffering, fails to state a cause of action for intentional infliction of emotional distress. In *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1047-48 (1988), the court held that "[t]he allegation that plaintiff suffered shame, humiliation, and embarrassment without further factual explanation does not meet the requirement of specificity called for in *Bogard*." In the instant case, plaintiff merely alleges that he has suffered emotional distress and mental anguish without stating any facts to show the extent of his mental suffering. (*See*, SAC, ¶ 34). Mere allegations that plaintiff has suffered mental anguish and emotional distress is insufficient as a matter of law to satisfy the requirement of proof necessary for an intentional infliction of emotional distress claim. At most, plaintiff alleges that he has suffered some emotional distress, not that said emotional distress was severe or extreme. Even if plaintiff claimed that the distress he has suffered was severe or extreme, he provides no facts in his Second Amended Complaint to support such a claim, as required by *Michaelian* and *Bogard, supra*. Therefore, the second element of the tort of intentional infliction of emotional distress also fails.

C. Defendants Are Nevertheless Entitled To Immunity Under California Government Code § 821.6.

California Government Code § 821.6 provides as follows:

> "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

It is undisputed that the basis of plaintiff's intentional infliction of emotional distress claim against defendants Sundstedt and Najera arise from their alleged actions and omissions with regard to the *Cuskey* matter. Thus, all actions or omissions taken by these defendants in the investigation and prosecution of the *Cuskey* case are immunized. *See Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1211 (1994) (§ 821.6 immunity "bars liability for any injury caused by the prosecution of the judicial proceeding, even if the person suffering the injury is not the target of that prosecution.") Thus, even though plaintiff was not the subject of the criminal prosecution in *Cuskey*, defendants are still entitled to immunity against all of plaintiff's claims that arise out of the handling of the *Cuskey* case. For the foregoing reasons, all of plaintiff's allegations of intentional infliction of emotional distress that are related to the handling of the *Cuskey* matter are improper as defendants are completely immune from such tort claims under § 821.6.

VI. CONCLUSION

For the reasons set forth above, defendants Gil Garcetti, Frank Sundstedt and Carol Najera respectfully request that the Court grant their Motion for Summary Judgment against plaintiff in its entirety. Alternatively, defendants request that the Court summarily adjudicate issues in favor of defendants as set forth in the Notice of this Motion.

DATED: December 17, 2001

FRANSCELL, STRICKLAND,
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	**Case No. CV 00-11106 AHM (AJWx)** **Honorable A. Howard Matz** **DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW RE MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION** **[Notice Of Motion And Motion For Summary Judgment, Or In The Alternative, Summary Adjudication Of Individual Issues; Memorandum Of Points And Authorities filed concurrently herewith]** Date: January 7, 2001 Time: 10:00 a.m. Court: 14

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

Defendants GIL GARCETTI, FRANK SUNSTEDT, and CAROL NAJERA hereby submit the following Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment, or in the alternative, Summary Adjudication filed concurrently herewith.

UNCONTROVERTED FACTS

1. Plaintiff has been employed as a deputy District Attorney with the Los Angeles County District Attorney's Office since 1989. (Exhibit "B," Deposition of Richard Ceballos [hereinafter "Plaintiff Depo."], 13:10-12.)

2. While plaintiff was assigned as the calendar deputy at the Pomona branch, plaintiff was approached by a criminal defense attorney, Richard Escobedo, who represented one of the defendants in the case of *People v. Cuskey*, which had been assigned to another deputy District Attorney. (Exhibit "B," Plaintiff Depo., 56:14-19.)

3. Mr. Escobedo told plaintiff that he believed that the arresting Sheriff's deputies from the Industry Station may have lied in the search warrant affidavit and requested that plaintiff review the case. (Exhibit "B," Plaintiff Depo., 56:20-57:2.)

4. Plaintiff apparently reviewed the affidavit and other documentary evidence, and concluded that the property described in the affidavit had been mischaracterized. (Exhibit "B," Plaintiff Depo., 62:25-64:12.)

5. After further investigation, plaintiff discussed the matter with Head Deputy District Attorney Frank Sundstedt and plaintiff's immediate supervisor Carol

Najera who purportedly agreed that there was a problem. (Exhibit "B," Plaintiff Depo., 74:9-23.)

6. On March 2, 2000, plaintiff prepared a memorandum/disposition report setting forth a summary of his investigation and his conclusion that the affidavit was falsified and misleading and his recommendation that the *Cuskey* case be dismissed and sent the memorandum/disposition report to defendant Sundstedt. (Exhibit "B," Plaintiff Depo., 44:13-16, 87:17-88:9; Exhibit "D," Sundstedt Depo., 56:8-12.)

7. Upon reviewing the memorandum, defendant Sundstedt had concerns about the *Cuskey* case but recommended that plaintiff revise the memorandum so that it did not include conclusions and blatant statements accusing the Sheriff deputies of committing felonious perjuries that had not been proven (Exhibit "B," Plaintiff Depo., 88:13-17; Exhibit "D," Sundstedt Depo., 56:8-57:15, 63:7-64:23.)

8. After the memorandum was modified, defendant Sundstedt contacted the appropriate Captain at the Sheriff's Department Industry Station and advised him that he thought there was a problem with the *Cuskey* case and requested a meeting to discuss it. (Exhibit "D," Sundstedt Depo., 57:16-24, 66:5-22.)

9. On March 9, 2000, a meeting was held at Mr. Sundstedt's office attended by a Sheriff's captain, lieutenant, the deputy sheriff who prepared the search warrant affidavit, the plaintiff, Mr. Gallon, and defendants Sundstedt and Najera. (Exhibit "B," Plaintiff Depo., 44:17-20, 55:13-15, Exhibit "D," Sundstedt Depo., 65:3-20.)

10. Upon listening to what the deputy sheriff who prepared the search warrant affidavit had to say at the meeting, Mr. Sundstedt was not sure that a dismissal without an airing of the evidence was the appropriate way to handle the *Cuskey* case, but rather, he believed that the best course of action was to proceed with the Motion to Traverse the warrant which had already been filed by the defense so that a neutral judicial officer could hear the testimonies and assess the evidence and make the call regarding the credibility of the officers.

11. Plaintiff did not continue to request to have the *Cuskey* case dismissed after the March 9, 2000 meeting. (Exhibit "D," Sundstedt Depo., 74:5-8.)

12. Plaintiff was subpoenaed by the defense in the *Cuskey* case to testify at the Motion to Traverse hearing which was to be heard by Judge David Milton. (Exhibit "B," Plaintiff Depo., 114:7-12.)

13. Plaintiff was the calendar deputy for Judge Milton at that time and had been so for about one year. (Exhibit "B," Plaintiff Depo., 46:7-11, 53:14-17, 130:23-131:6.)

14. Plaintiff testified at the Motion to Traverse hearing, and the Motion was denied. (Exhibit "B," Plaintiff Depo., 134:4-10; Exhibit "C," Reporter's Transcript of Plaintiff's Testimony at Motion to Traverse Hearing at 141.)

15. One of the defendants was convicted after trial and the other two defendants entered guilty pleas. (Exhibit "B," Plaintiff Depo., 134:11-18.)

16. Plaintiff contends that his opinions regarding the handling of the *Cuskey* matter led to various acts of

retaliation by defendants Sundstedt and Najera. (Exhibit "A," Second Amended Complaint ¶¶15, 17, 18, & 19; Exhibit "B," Plaintiff Depo., 135:23-136:3.)

17. Plaintiff alleges the first instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter purportedly occurred right after the meeting with the Sheriff's officials when defendant Sundstedt allegedly told plaintiff that he would no longer be a calendar deputy at the Pomona branch and would be reassigned as a trial deputy. (Exhibit "B," Plaintiff Depo., 45:15-47:14.)

18. Plaintiff alleges the second instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter allegedly occurred when defendant Najera informed him that one of his murder cases would be re-assigned to a lower level deputy District Attorney. (Exhibit "B," Plaintiff Depo., 141:14-143:1.)

19. Plaintiff also contends that he was not assigned any new murder cases and was denied a Grade IV promotion as a result of his opinions relating to the *Cuskey* case. (Exhibit "B," Plaintiff's Depo. 147:25-148:3, 150:15-16.)

20. In April 2000, the Pomona branch eliminated two calendar courts. Prior to then, it had four calendar courts, two of which were staffed by Grade IV calendar deputies, and two of which were staffed by Grade Level III deputies (one of which was plaintiff). (Exhibit "B," Plaintiff's Depo., 140:13-141:8; Exhibit "D," Sundstedt Depo. 93:19-95:9.)

21. Mr. Sundstedt decided that the two remaining calendar courts should have two calendar deputies and plaintiff was thereafter placed as a co-calendar deputy with a Grade IV deputy, Michael Grossbard. (Exhibit "B,"

Plaintiff's Depo., 136:6-12, 21-137:24; Exhibit "D," Sundstedt Depo., 94:6-95:4.).

22. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. (Exhibit "D," Sundstedt Depo. 102:15-104:25.)

23. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve until mid-August, 2000, when the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. (Exhibit "D," Sundstedt Depo. 105:1-106:8; Exhibit "F," Najera Depo., 158:16-20, 159:17-160:18.)

24. The fact plaintiff got transferred to be a filing deputy is because he was treated identically with every other Grade III that Mr. Sundstedt had on staff. (Exhibit "D," Sundstedt Depo., 106:4-8.)

25. Because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy.

26. However, plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one

with his experience and that being transferred to El Monte would require a longer commute. (Exhibit "B," Plaintiff's Depo., 25:5-14, 23-25.)

27. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000. *Id.*

28. As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that his deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure to Juvenile. (Exhibit "B," Plaintiff's Depo., 141:20-25; Exhibit "D," Sundstedt Depo. 97:17-98:10.)

29. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera went to all the calendar deputies and gathered a brief synopsis of all the pending murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. (Exhibit "F," Najera Depo., 153:13-154:2, 11-14.)

30. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to Grade II deputy Steve Gallon was plaintiff's and the other Grade II received a murder case from another Grade III deputy. (Exhibit "D," Sundstedt Depo, 101:16-19; Exhibit "F," Najera Depo., 157:3-18.)

31. Mr. Sundstedt chose the *Perrin* case, previously assigned to plaintiff, because he believed the nature of the case was suitable to provide a promising Grade II deputy

with experience of trying a homicide case. (Exhibit "D," Sundstedt 98:11-100:9.)

32. The number of new murder cases that would be assigned to trial deputies depended on the murder rate in Pomona. (Exhibit "B," Plaintiff's Depo., 148:17-149:1.)

33. Plaintiff was not assigned any new murder cases between the time of the hearing on the Motion to Traverse on the *Cuskey* case on March 20, 2000, and his re-assignment to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona. (Exhibit "D," Sundstedt Depo. 118:5-14.)

34. Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. Only 44 Grade IIIs were actually promoted. (Exhibit "D," Sundstedt Depo., 51:12-20; Exhibit "B," attached to Sundstedt Depo.)

35. Plaintiff was one of ten Grade IIIs from the Pomona branch that Mr. Sundstedt recommended to be promoted based upon his scores from the written exam and appraisal of promotability analysis. (Exhibit "D," Sundstedt Depo., 43:7-45:12.)

36. Of the ten candidates, Mr. Sundstedt rated eight equally outstanding, including plaintiff. Four of these eight candidates were actually promoted. (Exhibit "D," Sundstedt Depo. 43:8-11, 45:2-12, 46:12-18.)

37. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy after the Chief Deputy has meetings and discussions with the Directors of all the branch

offices and the three Assistant District Attorneys. (Exhibit "E," Garcetti Depo. 25:13-26:19, 30:15-32:1.)

38. Other than scoring the appraisal of promotability, the only other involvement that Mr. Sundstedt had in the promotion process was to opine to the Director of the Branch and Area Operation of his top three or four candidates whom he believed should get the Grade IV position. (Exhibit "D," Sundstedt Depo., 49:12-50:13.)

39. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's involvement in the same at the time he agreed with the recommendations of his Chief Deputy on the Grade IV promotions or that his approval with the recommendations had anything to do with plaintiff's purported speech. (Exhibit "D," Sundstedt Depo., 80:11-19; Exhibit "E," Garcetti Depo. 34:14-37:3.)

CONCLUSIONS OF LAW

1. The First Cause of Action is brought under 42 U.S.C. § 1983 and alleges violations of plaintiff's First and Fourteenth Amendment rights against Gil Garcetti, Frank Sundstedt and Carol Najera in their personal capacities only for purported adverse employment actions due to his alleged speech protected under the First Amendment.

2. 42 U.S.C. § 1983 provides in pertinent part:

> "Every **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " (Emphasis added.)

3. The Supreme Court recently clarified the procedure to be used by the district court in determining whether officials sued in their individual capacities are entitled qualified immunity. *Saucier v. Katz*, 121 S.Ct. 2151 (2001). The court must consider the initial threshold inquiry of whether, taking the facts in the light most favorable to the plaintiff, the defendant/official's conduct violated a constitutional right of the plaintiff. *Id.* at 2156. If not, the qualified immunity analysis ceases and the officials are entitled to immunity. *Id.* If the court determines a constitutional violation has occurred, the court must ask the next question: "whether the right was clearly established" at the time of the violation. *Id.* "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.* Finally, if the court determines that the right was clearly established at the time of the official action, the court must determine whether the conduct of the official was reasonable in light of the clearly established law at the time.

4. The inquiry as to whether speech is protected under the First Amendment in a public employment context is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

5. In order for a public employee's speech to be protected under the First Amendment, the employee must first establish that his speech was a matter of public

concern. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). If the employee fails in this initial burden, "it is unnecessary . . . to scrutinize the reasons" for the employer's action. *Connick, supra*, 461 U.S. at 146.

6. "[A] 'narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech.'" *Brewster v. Board of Education*, 149 F.3d 971, 981 (9th Cir. 1998), *cert. denied*, 526 U.S. 1013 (1999) (quoting *Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997)).

7. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers, supra*, 461 U.S. at 146.

8. "The 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment, and thus 'ensures that a court will test the reasons for restriction against first amendment standards.'" *Brewster, supra*, 149 F.3d at 979.

9. This second step requires the court to conduct a *Pickering* balancing test wherein the court weighs the plaintiff's interest in the protected speech versus the State's interests in ensuring workplace efficiency and avoiding workplace disruption. This balancing test must **clearly** favor the plaintiff in order for a claim of qualified immunity to be defeated. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick, supra,* 461 U.S. at 148 n.7; *Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999).

10. "In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.'" *Brewster, supra,* 149 F.3d at 979 (citing *Connick v. Myers*, 461 U.S. 138, 151.)

11. Moreover, an important factor for the court to consider in the *Pickering* balancing test is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague." *Id.*; *see also, Brewster, supra*, 149 F.3d at 978, 981and *Roe, supra,* 109 F.3d at 585.

12. "Speech focused solely on *internal policy and personnel grievances* does not implicate the First Amendment." *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (overturned on other grounds) (emphasis added).

13. In conducting the *Pickering* balancing test, the district court may also consider whether the statement was false or made with reckless disregard of the truth. *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998); *Brewster*, supra, 149 F.3d. at 981; *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995).

14. Plaintiff bears the burden of proving the rights he alleges to have been violated were clearly established. *Romero v. Kitsop County*, 931 F.2d 624, 627 (9th Cir. 1996).

15. "As the qualified immunity defense has evolved, it provides ample protections to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

16. "The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (citations omitted).

17. The elements that plaintiff must prove in order to constitute a valid cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993) (quoting *Christensen v. Superior Court* (Cooperman), 54 Cal. 3d 868, 903 (1991)).

18. "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593 (1979). The "conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "outrageous!"'" *KOVR-TV, Inc. v. Superior Court* (Cecchettini), 31 Cal. App. 4th 1023, 1028 (1995) (quoting Rest. 2d Torts, § 46 com. d.).

19. "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, **even if improper motivation is alleged**."

Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80 (1996).

20. Plaintiff may recover for intentional infliction of emotional distress only when he has, in fact, suffered severe emotional distress. *Girard v. Ball*, 125 Cal. App. 3d 772, 787 (1981).

21. For emotional distress to be severe, "[B]oth the intensity and duration of the emotional distress suffered must be considered in determining its severity. Severe emotional distress means 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Kiseskey v. Carpenters' Trust for So. California*, 144 Cal. App. 3d 222, 231 (1983) (citing *Fletcher v. Western National Life Ins. Co.*, [1]0 Cal. App. 3d 376, 397 (1970).)

22. Whether the emotional distress suffered by plaintiff can be reasonably be found to be severe is a question of law to be initially determined by the trial court. *Fletcher., supra,* 10 Cal.App.3d at p. 397.

23. Mere allegations that the plaintiff suffers emotional distress without facts indicating the nature or extent of such mental suffering, fails to state a cause of action for intentional infliction of emotional distress. *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617 (1985); "The allegation that plaintiff suffered shame, humiliation, and embarrassment without further factual explanation does not meet the requirement of specificity called for in *Bogard*." *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1047-48 (1988).

24. "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." California Government Code § 821.6.

25. California Government Code § 821.6 immunity "bars liability for any injury caused by the prosecution of the judicial proceeding, even if the person suffering the injury is not the target of that prosecution." *Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1211 (1994).

DATED: December 17, 2001.

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